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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-802

Supreme Court No. .....

Court of Appeals No. 71-1029

JOSEPH BARBARA, JR.
Petitioner,

v.

PERRY JOHNSON, Warden of the State Prison of Southern Michigan,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, by his attorneys, Frederick B. Bellamy and Neil H. Fink, pray that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

Petitioner was convicted in the Circuit Court for the County of Oakland, State of Michigan on August 13, 1969. Sentence was imposed on September 19, 1969. The Court of Appeals for the State of Michigan affirmed the conviction, and handed down an opinion, on April 29, 1970, set forth in Appendix A. Petitioner thereafter filed Application for Leave to Appeal to the Michigan Supreme Court, and on July 16, 1970 that Court denied said Application. The Order of Denial is set forth as Appendix B.

Petitioner then petitioned for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan. Said petition was granted in that court's order and opinion of December 9, 1970 (Appendix C). The United States Court of Appeals for the 6th Circuit reversed the District Court on October 19, 1971 (Appendix D). Rehearing of the case was denied by an order issued on November 19, 1971 (Appendix E).

2. JURISDICTION

The opinion and judgment of the 6th Circuit Court of Appeals was entered on October 19, 1971. Rehearing was denied on November 19, 1971. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254 (1).

3. QUESTION PRESENTED

The question presented by this petitioner is whether the Court of Appeals committed error in reversing the District Court's Order granting a Writ of Habeas Corpus which Order granting said Writ ruled in effect that Petitioner's constitutional right to a fair trial, by an impartial jury, was denied due to the repetitive and egregious acts of misconduct by witnesses Peter Lazaros and Delores Lazaros to-wit: the continuous injecture by said witnesses of extraneous, inflammatory and prejudicial matters including references to the Mafia in the presence of the jury.

4. STATUTES AND CONSTITUTIONAL PROVISIONS

The constitutional provision is involved herein:

The Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. STATEMENT OF THE CASE

Joseph Barbara, Jr., petitioner-appellee herein, was charged with the extortion of Mrs. Peter (Delores) Lazaros, contrary to MCLA 1948 §750.213 (MSA §28.410), the Michigan Extortion statute.

Trial commenced on August 1, 1969. The matter was submitted to the jury on August 12, 1969. The jury returned with a verdict of "Guilty" as charged. On September 19, 1969, the petitioner was sentenced to a term of 7 to 20 years in prison.

The petitioner appealed of right to the Court of Appeals of the State of Michigan. On April 29, 1970, the Court of Appeals, by written opinion, affirmed the conviction. On July 16, 1970, the Supreme Court of the State of Michigan denied the petitioner's Application for Leave to Appeal. *People v. Joseph Barbara, Jr.* (1970), 23 Mich App 540, leave denied 383 Mich 803.

Thereafter the petitioner filed a Complaint for Federal Habeas Corpus pursuant to 28 USC 2241-2254 [2241(c)(3)]. The State of Michigan responded by a Motion to Dismiss. Following submission of briefs, the Honorable Fred Kaess, District Judge, granted the writ. The State promptly claimed an appeal, and Judge Kaess thereupon admitted the petitioner to bail and granted the State a Stay of Proceedings Pending Appeal.

The United States Court of Appeals for the Sixth Circuit vacated the Order granting the Writ of Habeas Corpus and remanded the cause to the District Court with instructions to dismiss the petition. The petitioner filed for a rehearing in the United States Court of Appeals with a suggestion that the said rehearing be held *en banc*. The

Court of Appeals denied the petition for rehearing *en banc*. The petitioner's rehearing *en banc* contained an alternative prayer for relief to-wit: that the Court of Appeals, if it did not grant the rehearing, remand the cause to the District Court with instructions to conduct a hearing to determine, to what extent, false testimony was given by one of the key prosecution witnesses at the state court trial. The alternative prayer for relief was also denied.

The predicate for the suggestion that false testimony may have been given during the State Court trial was the transcript of *voir dire* testimony of prospective jurors in a Federal trial entitled *United States v. Lazaros*, Criminal No. 14325 which trial was being conducted in the District Court of the United States for the Eastern District of Michigan, Southern Division. That case involved a twelve (12) count perjury indictment charging one Peter M. Lazaros (a key prosecution witness in petitioner's State Court trial) with various criminal violations involving false testimony before a Federal Grand Jury. During the questioning of the jury in the Lazaros trial, defense counsel, F. Lee Bailey, indicated that Lazaros would admit he lied to the grand jury as to all counts but that he was forced to do so by law enforcement officials. He further indicated that his perjury testimony was not a willful act on his part. One of the counts of the perjury indictment against Lazaros involved a subject matter which was also the subject of inquiry at petitioner's state court trial. Eventually during the trial Lazaros hedged as to that act of perjury maintaining that that was true but that the eleven (11) other acts of perjury alleged were indeed false but that he was forced to give that testimony.

6. REASONS FOR GRANTING THE WRIT

THE UNITED STATES DISTRICT COURT, IN GRANTING PETITIONER'S WRIT OF HABEAS CORPUS, CORRECTLY DETERMINED THAT APPELLEE'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL, BY AN IMPARTIAL JURY, WAS EFFECTIVELY OBLITERATED BY THE REPETITIVE AND EGREGIOUS ACTS OF MISCONDUCT BY WITNESSES, PETER LAZAROS AND DELORES LAZAROS, TO WIT, THE CONTINUOUS INJECTURE BY SAID WITNESSES OF EXTRANEOUS, INFLAMMATORY AND PREJUDICIAL MATTERS IN THE PRESENCE OF THE JURY.

The Sixth Amendment to the United States Constitution guarantees the right of an accused to a fair trial. The right to a fair trial is really the very essence of due process. The Fourteenth Amendment to the United States Constitution requires that no state shall deprive any person of life, liberty or property without due process of law.

As was eloquently stated in *Baker v. Hudspeth*, 129 F. 2d 779 [C.A. 10 (1942)]:

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction for a criminal offense illegal and void and redress therefor is within the ambit of habeas corpus. Ex parte Hans Neilsen, Petitioner, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118: In re Bonner, Petitioner,

151 U.S. 242, 259, 14 S.Ct. 323, 38 L.Ed. 149; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed 1461; Bowen v. Johnston, 306 U.S. 19, 59 S.Ct. 442, 84 L.Ed. 455 and Huntley v. Schilder, 10 Cir., 125 F.2d 250. Cf. Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969; Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406, and Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. * * * "

The Supreme Court of the United States has judicially recognized that a fair trial is the most basic guarantee afforded by the Federal Constitution and the atmosphere in which the trial is conducted must be conducive toward that end:

> "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." *Estes v. State of Texas,* 381 U.S. 532, 540, 85 S.Ct. 1628, 1632.

It is petitioner's contention that he was denied his forementioned constitutional guarantee because of the conscious efforts of the witnesses Delores and Peter Lazaros to prejudice his right to a fair trial. Because of the Lazaros' patently deliberate and successful efforts to inject extraneous and highly prejudicial matters into the trial notwithstanding a pre-emptory instruction by the Court and several further instructions during the course of the trial, the defendant has suffered a conviction and a prison sentence predicated on a record that is certain to shock this Court's judicial conscience. Quoted below in verbatim fashion are those portions of the testimony of Peter and Delores Lazaros which petitioner claims were calculated to, and did in fact, inject prejudice into the record and deprive him of a fair trial:

Re-direct examination of Delores Lazaros conducted by Mr. Bain:

"Q. Delores—Mrs. Lazaros, you remember Mr. Barris directed your attention or our atention to page 11 of the statement which you made to me, and asked you if you hadn't told me at that time that the money was in the safe, that was taken, and I now direct your attention to this statement, which is four lines under what Mr. Barris read to you. 'Was the money in the same box the jewelry was in?' That was the question. And the answer was 'Yes', Do you remember making that statement?

A. Yes.

Q. You were also asked by Mr. Barris why you did not report this to various attorneys, one of whom was Mr. Albert. Do you know whether or not Mr. Albert was a friend of Mr. Barbara?

A. Yes, he was.

Q. And how did you first meet Mr. Albert?

A. I met Mr. Albert at the hospital.

Q. Who was present at that time?

A. Mr. Barbara, Mr. Albert and my husband and another attorney; I can't remember all of them.

Q. To your knowledge, do you know who brought Mr. Albert into the case?

A. I don't know what that was all about, but they were all friendly.

Q. Mr. Barris asked you a question regarding the letter which you brought from your doctor, it wouldn't be safe for you to testify, or he felt it would be to your best interest not to testify for at least three weeks. You're aware, are you not, that this case was set as early ago as last January?

A. Yes, I am.

Q. And was adjourned at the request of Mr. Barris' office.

A. Yes.

Q. And with one exception, it has been adjourned a number of times since then, at the request of their office, with the exception of the time

we previously adjourned it because of your condition?

A. *Yes, and not only that, when I came here it wasn't three weeks yet to go, it was only about 13 days. And I didn't think that that would make so much difference. He made it sound like I didn't care about my unborn child, but I have a retarded son that this man didn't mind doing all those horrible things in front of.* (emphasis supplied)

Mr. Barris: Your Honor, I object, and I have a matter to take up in the absence of the jury.

The Court: Escort the jury into the jury-room.

(Jury leaves the courtroom)

The Court: The record may show the jury is not in the courtroom.

Mr. Barris: Your Honor, at this time, in the absence of the jury, I move for a mistrial. It's bad enough when Mr. Barbara has to go to trial in a situation where I have to cross-examine a pregnant woman and an obviously pregnant woman, that's already been raised on the record, here we have this witness volunteering a highly prejudicial statement against my client. The record doesn't show she's in tears.[1] I say, under these circumstances, it's very, very hard, if not impossible to get anything that even remotely represents a fair trial. It's not Mr. Bain's fault. He didn't ask her anything to

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[1] At this juncture counsel wishes to direct the Court's attention to *Collum v. State*, 107 Southern 35. In that case appellant was charged with seduction. The witness who was alleged to have been seduced fainted in the witness chair, whereupon the Court sent for her mother. The mother appeared in the Court in the presence of the jury weeping and said in substance, "Nobody knows how we have suffered over this trouble. Lord have mercy on us." The appellant moved for a mistrial which was denied. The Alabama Court of Appeals held that the denial of the motion for a mistrial is reversible error stating that the question is not whether the occurrence in the presence of the jury did in fact influence the verdict but whether it might have done so. The Court further stated; "The average man fears not the bayonet as he does a woman's tears."

bring out this outburst. It's not Mr. Barbara's fault or my fault. It's a fact of life. Here we have a woman, pregnant, who makes these sort of remarks about my client. It was with the greatest misgivings I even started the case where I knew I'd have to cross-examine a pregnant woman. Now we have the problem compounded by the latest outburst of Mrs. Lazaros. So I move for a mistrial.

Mr. Bain: I, of course, as much as anyone in the courtroom, want to see Mr. Barbara have a fair trial. The question—it was not responsive to my question—or the answer was not responsive to my question. There's no question about that. I personally don't feel the answer was such that it would prejudice the jury beyond the point where they can bring back a fair, impartial verdict. I'm going to leave it to the Court's final discretion.

The Court: I'm going to deny the motion. Mrs. Lazaros, you're going to just have to answer the question. I don't want to go through this—a mistrial means wer're going to stop this trial and start all over again. I don't want to do this again, and neither do you, so listen to the questions, answer the questions, and don't volunteer things.

A. I didn't mean anything. He was trying to make out before I didn't care anything about my unborn child.

The Court: Just listen to the question and answer the question. Motion for mistrial is denied, but you're cautioned to just answer the questions. Return the jury."

Direct examination of Peter Lazaros conducted by Mr. Bain:

"Q. State your full name for the Court, please, Mr. Lazaros?

A. Peter Nicholas Lazaros.

Q. And your address?

A. 2410 Dalesford Road, Troy, Michigan.

Q. And directing your attention, Mr. Lazaros, to March of 1968, did you have occasion, in that month, to go to Jackson Prison?

A. Yes, I have.

Q. Was that as a result of a conviction sustained in this Circuit Court?

A. Yes, sir.

Q. And what were you convicted of?

A. Well, that was back in 1960, I was convicted of defrauding a loan company named Public General—General Public Loan Corporation.

Q. How many counts were you indicted and tried on?

A. I believe it was two or three, but I was found innocent on one or two. I don't remember exactly.

Q. How many were you convicted of?

A. One or two.

Q. Prior to the time that you went to Jackson Prison, did you have occasion to meet Joe Barbara?

A. Yes, sir.

Q. Would you identify Mr. Barbara for the Court, please?

A. *Yes, that's the THING standing over there."*[2] (emphasis supplied)

Cross examination of Peter Lazaros by Mr. Barris:

"Q. Is this gentleman to whom I'm pointing Mr. Kilbee, of the State Police?

A. He could be there, yes.

Q. Well, you've been virtually living with this man for months?

A. Not with that man only, Mr. Louisell.

Q. All right, let me ask you this, that was no slip of the tongue when you called me Mr. Louisell?

A. What?

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[2] Defendant was an enormous man who at the time this remark was made weighed over 400 pounds.

Q. When you called me Mr. Louisell?

A. *YOU'RE NO DIFFERENT THAN MR. LOUISELL.*

Q. All right. Did you or did you not deliberately mis-call me?

A. *NOT DELIBERATELY. I CONSIDER YOU AS LOUISELL, ANYWAY.*

Q. I see. Well, I consider that's a compliment, for which I thank you.

A. *I DON'T CONSIDER IT A COMPLIMENT, SIR.*

Q. I know you don't. Now, sir, was Mr. Kilbee present last week, last Friday, when you called Mr. Barbara a big fat pig?

A. After he — I don't know if he was there. I presume he was there.

Q. Who were your body guards, at tax payers' expense, last week?

A. I wouldn't call them body guards, sir.

Q. What would you call them?

A. *I would call them law enforcement officers that are out to protect me from THESE PEOPLE.*

Q. All right, now, we'll use your language, Mr. Lazaros, we'll play the game according to your rules—

A. *YOU KNOW MY RULES, YOU'VE BEEN LIVING WITH MY KIND OF PEOPLE ALL YOUR LIFE, SO YOU SHOULD KNOW."* (emphasis supplied)

* * * * *

"Q. All right. Isn't it true that you've made other accusations against Mr. Barbara, other than the accusation here made by your wife?

A. What do you mean by that? Will you explain to me?

Q. Yes, I'll be happy to. Isn't it true that you have made a statement or statements to certain law enforcement agencies that at the Kingsley Inn, on or about December the 17th of 1967, Mr. Barbara paid a bribe, not only to certain Internal Revenue

agents, but also to Mayor Cavanagh of the City of Detroit?

A. Let me say this to you, while [sic] you want to know, Mr. Barris, Mr. Barbara, at that time he delivered the money, *REPRESENTING THE MAFIA, TO GIVE*—(emphasis supplied)

Mr. Barris: All right, your Honor, I move for a mistrial.

A. You asked me.

Mr. Barris: I didn't ask for that at all your Honor. I want to excuse the jury.

The Court: Escort the jury to the juryroom.

(Jury leaves the courtroom)

The Court: The record may show the jury is not in the courtroom.

Mr. Barris: Your Honor, the question I asked him could have been answered yes, no, or I don't remember. Here, Mr. Lazaros, for obvious reasons, injected the Mafia. Here, again, it isn't Mr. Bain's fault, he can't control this man and I don't think anybody else can.

The Court: Now, in response to one of your questions in chambers, I asked counsel to warn all witnesses not to use that term unless it was directly asked. Did you so indicate?

Mr. Bain: I certainly did.

Mr. Barris: I think this is a cool, calculated effort on the part of this man, who will stop at nothing to further prejudice Mr. Barbara. He's so smart, he's now done the very thing he didn't want to occur. But in any event, I think this is irreparable. It's something that was volunteered, and I don't know where anything else, other than a mistrial, could cure this thing. And it's only—we've only been in this trial a day. It isn't like we've spent three weeks.

The Court: Would you read the question and answer back?

(Reporter reads back the question and answer)

Mr. Bain: Now, if I might respond, as your Honor well knows, in chambers I was directed to

instruct Mr. Lazaros and his wife not to use the word Mafia. I did this in the witness room in the presence of Detective Aird and others. But I think Mr. Barris has purposely gone into the area. He's asked him regarding the allegation that Joe Barbara made certain pay-offs which, quite frankly, I knew nothing about prior to today. And if this allegation was made, if the question had not been answered here by Mr. Lazaros, I think, certainly, after he had gone into it, then I would have a right to ask, on re-direct, on whose behalf this money was paid. And I think, for that reason, that your Honor should not declare a mistrial. It may be inadvertent. He has said it at this time. I think, certainly, on re-direct, after we go into this area, I would have a right to ask on whose behalf the money was paid.

Mr. Barris: Well, your Honor, I'm sure it wasn't inadvertent. No more inadvertent than when he called me Mr. Louisell. This is a cool, calculated effort, by, that man—I don't mean Mr. Bain, I wouldn't saddle Mr. Bain with this man in a million years—a cool, calculated effort to prejudice this man in the eyes of the jury. It wasn't called for at all, by an answer. All he had to do is say 'yes,' 'no', or 'I don't remember'. He didn't have to come up with the word Mafia. In the first place, if he made such an allegation, it would be in connection with certain individuals, not with a group, but that's neither here nor there. I think it's as clear as my rather large proboscis that this man started out rather deliberately to inject that into the record. I'm not ever sure he'd deny it if you asked him. This man is bold enough to have done it deliberately. I think he did it deliberately.

The Court: Anything further?

Mr. Bain: Nothing further.

The Court: I'm going to take the motion under advisement. Proceed with the trial. And I caution the witness, do not mention that word again unless you are specifically asked a question which in-

volves the necessity of so answering. Do you understand?

A. Yes, your Honor.

The Court: All right. Return the jury. I'll take the motion under advisement.

(Jury returns to the courtroom)

The Court: The last answer to the last question is stricken, and the jury is instructed to disregard it. You may proceed."[3] (emphasis supplied)

• • • • •

"Q. Now, sir, do you remember testifying under oath on November 27, 1968, in a Judgment Creditors' proceeding, in which the questioner or interrogator was Mr. Harry Warren, and your attorney was James F. Finn, and the deposition commenced at quarter to 12:00 on that date, at your home in the City of Detroit?

A. I never had depositions with Mr. Finn representing me at my house.

Q. Is that right?

A. I don't remember anyway.

Q. Uh-huh. All right, now I want to ask you if you remember these questions being put to you by Mr. Warren, and Mr. Finn being right there—

Mr. Bain: I'm going to object, your Honor. I think we're now past that point—he testified he doesn't remember, he's cut off.

The Court: This is cross-examination, he may inquire to refresh his recollection, if he can.

Q. Referring to page 30—

A. First of all, Mr. Barris, let me ask you a question.

Q. Well, I didn't know you were running this court, Mr. Lazaros.

A. And I didn't know that you were running this court, Mr. Louisell.

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[3] The Court, of course, subsequently denied the Motion for a Mistrial.

Q. You called me Mr. Louisell again, is that right?

A. *YES, I ALWAYS CALL YOU MR. LOUISELL.*

Q. You did that deliberately, you know what my name is.

A. *YOU LOOK LIKE HIM, YOU ACT LIKE HIM, YOU REPRESENT THE SAME PEOPLE, AND YOU BELONG TO THOSE PEOPLE.*

Q. Are you through now?

A. Yes, I am.

Q. Do you have anything else to say?

A. No, sir." (emphasis supplied)

• • • • •

"Q. Did you make this answer under oath?

A. Look, we're here on extortion, we're not here on a bill that's already been paid, Mr. Barris. Let's get to the facts of this case.

Q. We're here to test your credibility.

A. *MY CREDIBILITY IS BETTER THAN YOURS, AND BETTER THAN THAT THING THERE."* (emphasis supplied)

• • • • •

"Q. Well, isn't it true, sir, that the Englander Furniture Company was literally taking your furniture out of your home?

A. Not my furniture, sir, Dalesford Farms, which is a corporation that I was General Manager at. Now, what has that to do with the extortion and the rape?

Q. You don't deny—

A. And destroying a child, what has that to do?

Q. Do you deny—

A. *WHY DON'T YOU ACT LIKE AN ATTORNEY INSTEAD OF A MEMBER OF US?*

Q. What was that?

The Court: Proceed.

Q. All right.

A. My whole family's been destroyed, Mr. Barris.

Q. Now, you say you've been telling the truth to the police officers for the last nine months?

A. *YES, I HAVE. AND I WILL CONTIUNE, AS LONG AS THEY LET ME STAY ALIVE, I WILL CONTINUE.*

Mr. Barris: Your Honor, I'm going to object—

The Court: That answer will be stricken. Proceed by question and answer.

Mr. Barris: I have a matter to take up with the Court at the first recess in relation to that unresponsive answer.

The Court: That answer is stricken, and the jury instructed to disregard it.

Q. Now, Mr. Lazaros, you know a gentleman by the name of Alex Phillos?

A. You asked me that yesterday. I said to you yes.

Q. All right, is it not true that you, within this last same nine months when you claim you've been telling the truth, counseled and advised Mr. Phillos to lie concerning a bribe?

A. That's a rotten lie on your behalf, Mr. Barris, and I will prove that in documents.

Q. All right, let me ask you this, isn't it true that you, on one occasion, told Mr. Phillos that unless he implicated now Judge Bronson, in a bribery attempt, that you would take him to the I.R.S.?

A. *THAT'S A ROTTEN LIE, MR. BARRIS. MR. PHILLOS IS UNDER THREATS RIGHT NOW FROM THESE PEOPLE, AND WE HAVE PROOFS TO THAT.*

Mr. Barris: Your Honor, I'm going to object to that.

A. You object to that?

The Court: Proceed by question and answer.

Mr. Barris. I am, your Honor. He doesn't respond.

A. I'm responding.

The Court: Just answer the question." (Emphasis supplied)

* * * * *

"Q. Mr. Lazaros, you and your wife were separated on occasion during your marriage, weren't you?

A. That's a lie.

Q. Absolute lie?

A. She filed for divorce, but we were never separated.

Q. She's petrified of you, isn't she? She's afraid of you?

A. Let me tell you something, Mr. Barris, you're going to ask me these questions like a gentleman. *LOOK, I'M FIGHTING FOR MY LIFE,* and I don't care what you say to me, but I love my wife and I love my kid.

Q. You've beat her up on occasion?

A. You're a liar. Whoever tells you that—*MY LIFE IS IN DANGER TODAY.* And I love my wife.

The Court: Proceed by question and answer.

Mr. Barris: I do, your Honor. I can't stop this man, nobody has been able to.

A. You're insulting me. I love my wife and I love my retarded kid, that he put back three years.

The Court: Listen to the questions, answer the questions and proceed from there.

A. I'm sorry, your Honor.

Q. In other words, anybody who said you beat up your wife, or said you struck your wife is a liar?

A. I never touched my wife.

Q. In other words, whoever said that is a liar, is that right?

A. That's right. I hope your family has to go through the same thing my kid has to go through.

Q. You've lived how many years with your wife?

A. 11 years.

Q. I'm sure you recognize her handwriting then, do you not?

A. *YES, BUT I KNOW YOU KIND OF PEOPLE, YOU'RE VERY GOOD EXPERTS ON THAT.*

Q. All right.

A. *I LIVE WITH YOU PEOPLE.*

Q. You don't live with me.

A. *YOU REPRESENTED ME. I KNOW YOUR KIND.*

Mr. Barris: Well, your Honor, I don't think I have to take this kind of abuse.

A. That's not my wife's signature.

Q. You deny that's your wife's signature?

A. It doesn't look like my wife's signature.

Q. You look at it again, you're under oath.

A. I looked at it once, I know I'm under oath. *I DON'T HAVE TO TAKE YOUR ORDERS. I'M NOT IN GREEKTOWN HERE.*" (emphasis supplied)

Cross Examination of Delores Lazaros by Mr. Barris:

"Q. You'll do practically anything to keep your husband from going back to jail, won't you?

A. You were just trying to imply I didn't care for my husband and I filed for divorce. Why would I do anything for somebody that I didn't love or that I wanted to go back to jail, sir? Why would I do anything for a person that you described that I don't love, who I do love?

Q. Is this the man whom you, under oath, accused of attempting to kill you on occasion?

A. I never said, under oath, that my husband tried to kill me.

Q. All right.

A. I told you I don't know if I signed those papers after they were written up or before they were written up. I was only in the attorney's office probably an hour.

Q. Are you suggesting this attorney gave you something to sign in blank and you signed in blank, is that what you're attributing to Mr. Heffner?

A. I didn't say anything bad about Mr. Heffner. I know attorneys do that, and so do you.

Q. I do, aye?

A. Yes, yes, you do. Because if I remember correctly, he told me he didn't even have grounds for divorce. My husband was in a lot of trouble then. I wasn't as brave as I am now.

Q. You wanted to abandom him in this time of trouble?

A. I didn't, did I? I'm here today. I didn't abandon him, did I? You're trying to say I didn't care for him. *DO YOU THINK ANYBODY WOULD SUBJECT HIMSELF TO WHAT I'M GOING THROUGH NOW, TO LIVE A LIFE LIKE VALLACHI DOES?*[4]

Mr. Barris: Well, I'm not going to let that pass.

A. Why?

The Court: Escort the jury into the juryroom.

(Jury leaves the courtroom)

The Court: The record may show the jury is not in the courtroom.

Mr. Barris: Well, your Honor, we now have another reference to anybody who is at all knowledgeable, suggesting that somewhere, involved in this case, is the Mafia. The name of Vallachi was now used by this witness, a man who reputedly has given testimony against individuals who supposedly were alleged to be involved in the Mafia. I don't know how many of these volunteered statements can come into this court without there being a recognition that this man can never get a fair trial under these circumstances.

I think that's devastating. Not as devastating as the Mafia remark, but still when you pile one up against the other, it doesn't leave much to the imagination of anyone.

The Court: Well, the motion will be denied. We certainly have to proceed in a little different manner from here on, with both of these witnesses." emphasis supplied)

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[4] The reference of course, is to Joseph Vallachi, the notorious so-called "Mafia" informer.

Re-direct examination of Delores Lazaros by Mr. Bain:

"Q. Mrs. Lazaros, the State Police Officers who stayed at your home, are they in uniform or not?

A. Yes, they are. And the cars are cars that have police markings on them.

Q. And how many are there?

A. There's one in front, there's one on the side of the house, and—well, not on the side, it's a circular drive, and you can see them as you walk in the front door.

Q. Just tell the jury how many State Policemen are there?

A. Sometimes there's three cars, and sometimes there's two cars. And they check everyone who comes in.

Mr. Bain: I have no further questions.

The Court: You may cross-examine.

Mr. Barris: Well, if your Honor will take judicial notice of the files of this cause, the Examination of this matter began November the 8th, 1968, I would have no cross-examination.

The Court: Is that correct? I wasn't there.

Mr. Bain: I will stipulate to that, your Honor. That's the date of the Exam.

Mr. Barris: No questions.

The Court: You may step down, Mrs. Lazaros, watch your step, there's two steps down.

A. *WHY DO I HAVE TO STEP DOWN? CAN'T I TELL THIS COURT WHAT HAPPENED?*" (emphasis supplied)

It is quite apparent from the above-quoted testimony that the Court's cautionary instructions to the jury to disregard much of the prejudicial matters brought to the jurors' attention was an exercise in futility. While the word "Mafia" was used only once, the references to this so-called "underworld network" were repetitive and clear. To say that the jurors in this case could render unto the defendant a fair trial after he had been linked to the Mafia requires men of

good conscience and intellectual honesty to play the role of a judicial ostrich.

The case of *United States v. Rubino,* 431 F. 2d 284, decided by this Court should be of some interest. Defendant Rubino was charged with various violations of the Internal Revenue Code. During the course of the trial, a Detroit News article appeared on the front page, which included the following reference to the Defendant Rubino:

> "Matthew (Mike the Enforcer) Rubino, reputed Mafia leader, has since gone to trial for income tax evasion in the Federal Court with Louisell as his lawyer. The trial is now in its second month."

Of the 14 jurors only one was shown to have definitely read the entire article, including the four-line paragraph alleged to have been prejudicial. The Sixth Circuit held that under these circumstances it could not find reversible error and placed much significance on the fact that "defense counsel could have requested that this juror be replaced by an alternate, but failed to do so". The Government on oral argument conceded in the Rubino case that had this information been presented during the trial, a mistrial would have certainly been in order.

What is of special significance to the instant case is the following language from Judge Peck's dissent:

> "The determination as to whether the material under attack is prejudicial in the present context may best be resolved on the basis of whether its admission into evidence over objection would constitute grounds for a mistrial or for the subsequent vacation or reversal of a judgment entered on a verdict. Thus whether the receipt in evidence of page 1 of The Detroit News of January 21, 1969, would constitute such prejudicial error becomes pertinent. No organization (if that be an acceptable term) today strikes such terror to the American

heart as does the Mafia. A current best seller in the field of American fiction depicts its evils, as do both fictional and allegedly factual presentations by national media. Its corruptions are constantly chronicled and its acrocities in every area of unsavory activity are endlessly portrayed in vivid detail. We daily hear and read how the ill-gotten gains of its narcotic traffc, prostitution rings, usury rackets and murders by contract are invested in staggering sums in legitimate enterprises of every nature, frequently placing control in the hands of shadowy arch criminals. These observations are not based on facts that have not come into this record through admissible evidence safeguarded by confrontation and cross-examination of a witness testifying under oath, but neither did the appellant's characterization as 'Matthew (Mike the Enforcer) Rubino, reputed Mafia leader', get into the record that way. *I AM OF THE VIEW THAT HAD THIS CLEARLY INADMISSIBLE STATEMENT BEEN RECEIVED BY THE JURY IN THE COURTROOM, NO AMOUNT OF JUDICIAL INSTRUCTION COULD HAVE ELIMATED ITS PREJUDICIAL EFFECT.* Similarly, I must conclude that the acquisition of prejudicial material outside the courtroom by at least two members of the jury in the present case requires reversal. * * * " (emphasis supplied)

In the instant case we need not trouble ourselves with determining, "how many rotten apples does it take to spoil the barrel" (See Judge Peck's dissent). The reason for that is the obvious—every member of the jury who decided Joseph Barbara, Jr.'s fate was exposed to the highly inflammatory and prejudicial Mafia remark. Every juror was further exposed to the repetitive and unmistakable references to that underworld organization.

In *United States v. DeDominicis*, 332 F.2d 207 (C.A. 2 (1964)), the Court was faced with the following situation: The defendant was convicted of buying unstamped and

illegally imported heroin. During the course of the trial a Government witness by the name of Morton testified on re-direct examination that a man by the name of Cippola, a Canadian supplier of the illegal drugs, had referred to the defendant in a conversation. Cippola was not available to testify or to be cross examined. The Court attempted to cure the error by instructing the jury to disregard the statement. The Court of Appeals found such an instruction insufficient to protect the defendant's rights. The Court held in substance that this attempt to show guilt by association was so prejudicial that the instruction was unlikely to remove the prejudice indelibly marked on the jurors' minds.

In *United States v. Sansone,* 206 F.2d 86 [C.A. 2 (1953)], the defendant was convicted of conspiring to import and sell heroin in violation of federal law. During the course of the trial a narcotics agent by the name of Guiliani testified that he had had a conversation with a man named Giannini, who had been named as a co-conspirator in the defendant's Indictment but who had not been arrested. The federal agent also stated that Giannini had told him that the defendant was the courier for a mob of traffickers in narcotics. The Court eventually instructed the jury that they were to disregard such testimony. The Court of Appeals, nonetheless, reversed the conviction holding as follows:

> "Whether cautionary instructions to the jury to disregard prejudicial evidence erroneously admitted will cure the error depends, of course, upon the nature of it and the circumstances in each instance. When it cannot with reasonable certainty be shown that the harm has been undone a reversal is required. See Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557. We think so much harm was done that it isn't reasonable to

conclude that it was eradicated in the ways attempted for that seems to be asking of the laymen composing the jury something which was well nigh impossible. Cf. Delaney v. United States, 1 Cir., 199 F.2d 107.

"Could we be sure that the jury was not substantially influenced adversely to the appellant, the judgment might be upheld—But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, a conviction cannot stand." Kotteakos v. United States, *supra,* 328 U.S. at page 765, 66 S. Ct. at page 1248.

"Judgment reversed and cause remanded." (at page 88)

In *Gregory v. United States,* 369 F.2d 185 [CADC (1966)], the defendant had been charged with a five-count indictment including first-degree murder, second-degree murder, two robberies and an assault with a dangerous weapon. He was convicted on all counts. The facts of the *Gregory* case insofar as they are applicable to the instant one may best be elucidated by a quotation from that case:

"A prosecution witness, Police Officer Johnson, on two occasions volunteered testimony concerning an offense, for which appellant was under indictment in another case, totally unrelated to the crimes for which appellant was on trial. The police officer was called in rebuttal by the Government to testify that three weeks before the events in suit appellant was clean shaven, several of appellant's

witnesses, including himself and his barber, having testified that for some months prior to the robbery, appellant had been wearing a goatee. The prosecutor had previously assurred the court and defense counsel that the Government would not develop the evidence that at the time the officer saw appellant clean shaven, appellant had assaulted him with a gun.

"On direct examination of the police officer, no reference to the assault with the gun was made. On cross-examination, however, when the officer began a non-responsive answer to a question, defense counsel objected, fearing that he might voluntarily introduce the gun incident. The Trial Court overruled the objection and ordered the witness to finish his answer. In finishing his answer, later held non-responsive by the court, the officer testified to the assault with a gun. Whereupon defense counsel moved for a mistrial. The motion was denied with the simple instruction that the jury should disregard the answer. The motion for the mistrial and the instruction to the jury to disregard the witness' testimony with reference to the gun incident were made in the presence of the officer on the witness stand. Five questions later, in the same cross-examination, the officer again volunteered the testimony that appellant had assaulted him with a gun. Again there was a motion for a mistrial, which was again denied with a perfunctory instruction to the jury to disregard the testimony." (at pp. 189, 190)

The Court of Appeals for the District of Columbia condemned the voluntary statements of Officer Johnson and held that the cautionary instructions of the Court were insufficient to remedy the situation:

"With reference to the effectiveness of the court's cautionary instruction to the jury to disregard the improper testimony, particularly the in-

structions given in this case, it may be useful to quote again from Mr. Justice Jackson concurring, in Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949): 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.'[2] The volunteering by police officers of inadmissible testimony prejudicial to the defendant has been condemned time and again by both state and federal courts. For example, in Wright v. State, Okl. Cr. App. 325 P.2d 1089, 1093 (1958), where a law enforcement officer injected this type of prejudicial testimony, not twice as here, but only once, the court states: 'This type of testimony has often been referred to as "evidential harpoon" that has been wilfully jabbed into the defendant and then jerked out by an admonition to the jury not to consider the same. This court has never condoned, but often criticized a witness being intoxicated with eagerness in an all-out effort to obtain a conviction. * * * Officers must be aware that an overzealous attitude is, in most instances, detrimental to the prosecution and often results in a retrial of the case at considerable expense to the State.'" (at p. 90)

In *Nalls v. United States*, 240 F.2d 707 [C.A. 5 (1957)], the Court in reversing a narcotics conviction commented as follows at page 710:

"An unresponsive statement was volunteered by City Policeman Scott for which the Government was not responsible. When asked what he did when he first saw defendant, the officer replied: 'Our Department carried a pick-up on him on a warrant

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[2] The Supreme Court of the United States of late has come to the realization that Justice Jackson spoke the truth in the *Krulewitch* case. *Bruton v. United States*, 88 S.Ct. 1620, *Jackson v. Denno*, 84 S. Ct. 1774.

held by the sheriff's office.' The Court, upon objection and request, stated: 'I believe at this stage of the proceeding I will sustain the objection and instruct the jury not to consider that remark.' A mistrial was promptly asked and refused. We think that this statement was calculated to influence the thinking of the jury and was likely to induce prejudice, just as was the statement made by the attorney in closing the Government's case. It is difficult to conclude that such occurrences were not likely to have a bearing on the jury's verdict. * * * "

In *Perecinsky v. Commonwealth (Ky.)*, 340 S.W. 2d 233, the defendant had been convicted of grand larceny. Prior to trial a ruling was made prohibiting the Commonwealth from showing certain evidence garnered as the fruit of an unlawful search. Nevertheless an overzealous police officer injected by way of testimony facts showing that which was prohibited by the court's ruling. The court held in substance that the witness' testimony was actually contemptuous and had effectively deprived the defendant of a fair trial.

The above-mentioned cases are among a plethora of federal and states cases condemning the practice of permitting witnesses to inject extraneous and prejudicial matters into the trial of a criminal case and then permitting the state to hide behind a patently ineffective cautionary instruction.[6]

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[6] See also *Wright v. State* (Okl), 325 Pac.2d 1089 (1958); *Riddle v. State (Okl)*, 373 Pac.2d 832 (1962); *Riddle v. State (Okl)*, 374 Pac. 2d 651 (1962); *State v. Taylor*, (Wash), 381 Pac.2d 617 (1962); *Brown v. United States*, 202 F.2d 474 [C.A. 5 (1953)]. Of further interest is the following dicta from *People v. Trinchillo*, 153 N.Y. Supp.2d 685 (1956): "Further, we feel constrained to comment on the testimony and attitude of the witness, Detective Tracy. His failure to answer questions responsively and his repeated attempts in answering questions to inject extraneous matters, although admonished several times by the trial judge, tended to be prejudicial to a fair and just trial."

Further, of great concern not only to the defendant, but to members of the bar and bench alike, is the witness Peter Lazaros' verbal attacks on counsel for the defendant.[7] No purpose will be served by argument delineating the venom-filled accusations leveled at defense counsel. Suffice it to say, that as one reads this record he is constrained to wonderment as to why the Trial Judge permitted these attacks on counsel to go unpunished. Is not the following language contained in *People v. Brocato,* 17 Mich. App. 277 (1969), applicable to this situation even though the conduct here complained of emanated from a witness rather than from the prosecuting attorney?:

> "We feel compelled to note, also, that the trial court failed to discharge his statutory duty to control all proceedings during trial and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. C.A. 1948, §768.29 (Stat. Ann 1954 Rev. §28.1052). Great care should be exercised by the trial court as well as the prosecuting attorney to insure that no statement be made in the presence of the jury which would jeopardize a defendant's right to a fair trial. People v. De Lano (1947), 318 Mich. 557. The trial court is not a mere figurehead. He is charged with directing important public business. To this end he should not hesitate to control the scope of the evidence when, as here, immaterial or prejudicial matters are being introduced for a purpose clearly extraneous to the ascertainment of innocence or

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[7] See *United States v. Guglielmini* 384 F.2d 602 [C.A. 2 (1967)], wherein the Court of Appeals reversed because the total effect of errors consisting of the trial judge's statements serving to demean defense counsel and casting unfavorable light on defense, mention of irrelevant, prejudicial evidence, played a part in casting a serious doubt on the fairness of the trial.

guilt. He must not hesitate to keep the conduct of the attorneys within the boundaries of legitimate argument and to promptly check them when they exceed it.

"The rulings of the court are to be followed and when they are not the court should exercise its power of contempt or at least reprimand the offending person in the jury's presence. Most of the trial court's rulings on the point we have mentioned were eminently correct. The error occurred because the prosecution was allowed to ignore them with impunity" (at pp. 304, 305).

It has been written that "The quality of a nation's civilization can be largely measured by the methods it uses in the enforment of its criminal law." Shaefer, *Federalism and State Criminal Procedures,* 70 Harv. L. Rev. 1, 26 (1956). If this nation's civilization is measured by the methods used to convict petitioner, then we have indeed returned to the concept of trial by ordeal.

7. ADDENDUM

The thesis advanced by the State throughout all appellate proceedings and on collateral review in the Federal Courts, has been that the interjection of the prejudicial extraneous matter of the witnesses were the product of the conspiratorial efforts of the defense lawyers. The Federal Court of Appeals seemed to agree with this thesis in determining that the unresponsive answers were provoked by defense counsel. The Court of Appeals felt that "The trial strategy adopted by the defense was inherently provocative."

The question of whether or not defense counsel deliberately engendered the answers complained of, or whether

there was a conscious effort on the part of the two witnesses to deprive the defendant of a fair trial and create a circus atmosphere was hotly debated at every stage of the proceedings. For all of those who have any knowledge of the recent Lazaros perjury trial hereinbefore referred to, the question is no longer open to debate. The Lazaros perjury trial was tainted and earmarked by the same prejudicial conduct by the same witnesses.[8]

Counsel in the Lazaros perjury case were two of the country's most well thought of attorneys (the special prosecutor was Mr. Howard O'Leary, counsel to the United States Senate Anti-Trust Committee and Administrative assistant to Senator Philip Hart. Defense counsel was F. Lee Bailey, an outstanding member of the Bar of the State of Massachusetts.[9])

The bizarre federal trial of Peter Lazaros was marked by the following events: Mrs. Lazaros, as she did in State Court, was subject to outbursts of crying which precipitated her husband's lawyer to stand up in open court and demand that they "get her out of here." Her outbursts lead to the court not only banning her from the courtroom but from the building. After being ordered from the building, Mrs. Lazaros regained access to the building and returned to the 7th floor (in which the trial was being held and where the jurors were being housed during their deliberations) and

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[8] Counsel for petitioner here is unable with the record as it is now postured to verify this with anything other than his own statements.

However, counsel is attempting to get copies of relative portions of that trial transcript and is further attempting to get affidavits of some of those who observed the trial firsthand.

[9] Bailey himself has said on record in the Circuit Court for the County of Oakland, State of Michigan, that "Mr. Lazaros very seldom tells the truth."

made a supposed attempt at suicide by standing on the ledge next to the window. She was again removed from the building. Mrs. Lazaros then went onto Lafayette street adjacent to the Courthouse where it was reported that she laid down in the middle of the street with some sort of attack, but after being taken to the hospital, she was released without treatment. Her testimony included volunteered derogatory and ugly references to the family of the United States Attorney. Mr. Lazaros apparently feigned a diabetic attack in the courthouse. Mr. Lazaros further made accusations against the bailiff in charge of the jury to the extent that evidentiary hearings had to be held close to midnight on one of the trial days. As one government attorney put it, "The Lazaros' are a one family crime wave."

Petitioner's state court trial was the first in a sequence of events that has to qualify as among the most bizarre in the history of Michigan jurisprudence. The original allegations which lead to petitioner's arrest in this case precipitated national interest in Lazaros. Peter Lazaros was looked on at this early stage as a new "Vallachi." Lazaros was a self-styled former Mafia leader who was leading law enforcement officials to believe that he had vast sources of information about the mysterious underworld network. Press conferences were held by Lazaros who was being viewed at that point as something of a local hero. It was during the apex of Lazaros' popularity that Joseph Barbara went to trial. Subsequent to the petitioner's trial, the hunter became the hunted. Lazaros has been indicted by state and Federal grand juries on wide ranging charges of perjury. The Federal indictment resulted in a conviction on all twelve (12) counts. His own lawyer has made a public statement that Lazaros "seldom tells the truth", as hereinbefore noted. Every right-thinking person who has be-

come acquainted in some way with Mr. and Mrs. Lazaros will say openly that they are totally unworthy of belief. Unfortunately, those facts were not known during petitioner's state court trial, and Joseph Barbara faces seven to twenty years of imprisonment based on the uncorroborated testimony of people who now are known to have no credibility whatsoever.

8. CONCLUSION

For the reasons aforementioned, petitioner does pray that a petition for certiorari for the Sixth Circuit shall be granted or in the alternative that this cause shall be remanded to the District Court with instructions that an evidentiary hearing be conducted to determine whether or not perjury was committed at petitioner's state court trial.

Respectfully submitted,

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Attorney for Petitioner
NEIL H. FINK
Of Counsel

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS[a]

(Division 2)

The People of the State of Michigan,
Plaintiff-Appellee,
v.
Joseph Barbara, Jr.,
Defendant-Appellant.
No. 8150

(April 29, 1970)

Before: R. B. Burns, P. J., Fitzgerald and Van Domelen, JJ.

Fitzgerald, J.

Joseph Barbara, Jr., the defendant in the instant case, was charged with the extortion of Mrs. Peter (Delores) Lazaros contrary to CL 1948, § 750.213 (Stat Ann § 28.410). Defendant stood mute to the charge and a plea of not guilty was entered on his behalf. Following several adjournments, the trial commenced on August 1, 1969. Objection was raised by the defense to holding the trial at that time since the complaining witness was pregnant. The matter was submitted to a jury on August 12, 1969, which found the defendant guilty of the crime with which he was charged. On September 19, 1969, defendant was sentenced to serve 7 to 20 years in prison.

During the course of the trial, Mrs. Lazaros testified that Joseph Barbara, Jr., came to her home while her husband was in prison and, through the use of threats upon the lives of members of her family, was successful in efforts to rape

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[a] The trial court did not deliver an opinion.

and extort money from her. It was alleged that defendant informed Mrs. Lazaros that if she did not cooperate, he would have her husband killed in prison. Complainant charged that similar threats were made on her son's life.

The complainant feared for her husband's life and informed no one of these events until some six months later when her husband returned from prison. A complaint was then filed with the State Police which resulted in defendant's arrest.

Testimony was also elicited from Nicholas Lazaros, father of Peter Lazaros, to the effect that defendant had come to the Lazaros home while his son and daugher-in-law were at the police station. Threats were made and defendant pushed the elder Lazaros to the ground. Evidence was also introduced that Barbara had agreed to help Peter Lazaros on his appeal from a previous criminal conviction and that Lazaros was angry because things had not gone as well as anticipated.

Following the prosecution's rebuttal, the name of Tischia Lazaros, mother of Peter Lazaros, was reindorsed upon the information. Her name was originally on the information, but it was removed during trial. She corroborated the testimony previously given by her husband, Nicholas Lazaros.

Several issues are raised on this appeal; the first concerns the question of whether the continuous injection by witnesses Peter and Delores Lazaros of extraneous matters in the presence of the jury deprived defendant of his right to a fair trial by an impartial jury. The allegedly prejudicial matters concern references made which imply that defendant and his attorneys were connected with the "Mafia", thus inferring a guilt by association. Defendant argues that in light of the remarks made, the judge's in-

structions to the jury, striking all references to the above subject, were not sufficient because of the inflammatory nature of these utterances.

The people argue that defendant's attorneys deliberately phrased questions which were calculated to bring out references to the "Mafia", thus inviting error for purposes of having a mistrial declared.

In *People v. Wolke* (1968), 10 Mich App 583, this Court addressed itself to questionable evidence injected into a trial. The Court discussed the question of when objectionable evidence will be held to so prejudice a jury that a new trial must be granted. In analyzing the applicable authorities, it was found that two standards exist; namely, that once a prejudicial remarks is made, the "ink spot" may not be blotted from the minds of the jury by express instructions. On the other hand, recognition was also given to a line of cases which presumed that a jury considers only the testimony permitted by a court to stand. This Court held that the choice of which standard to apply ultimately rests upon the degree of prejudice generated by the objectionable evidnce. Only if the testimony is inherently prejudicial or inflammatory will there be an "ink spot" on the minds of the jurors which cannot be erased.

In the case at bar, we are dealing with unresponsive, irrelevant, and spontaneous answers volunteered by two witnesses. In 2 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 600, it is stated:

> "Error cannot be predicated upon the fact that a witness gives an improper or irrelevant answer where the question was a proper one and neither the court nor counsel was at fault. Improper testimony offered by a witness and promptly struck out by the court on objection is not reversible error. * * * A witness cannot put error into a case by an unauthorized remark,

neither called out by a question nor sanctioned by the judge; and if what he says or does improperly is likely to do much mischief, it is presumed that the judge will apply the proper corrective measures in his instructions if requested to do so."

A review of the problem with which we are faced leads to the inescapable conclusion that if error could be easily predicated on the improper utterances of a witness, it would be most difficult ever to conduct a proper trial. *People v. Droste* (1910), 160 Mich 66.

Unresponsive answers, irrelevant in nature alone, are not sufficient to cause reversible error. The instructions to disregard the utterances made were quite sufficient to instruct the jury on those matters not properly before them and cured the possibility of prejudice to defendant.

The next question discussed concerns an alleged error in permitting the prosecution to call Mrs. Tischia Lazaros in rebuttal to help prove its case-in chief. Defendant asserts that such a last minute action, after the defense had rested its case in rebuttal, unfairly prejudiced defendant's rights. The people argue that the question of reopening the proofs is solely within the court's discretion and, further, that the testimony only related to matters which they had previously introduced.

In support of this assignment of error, defendant relies on our previous decision in *People v. Sacharczyk* (1969), 16 Mich App 710. However, the facts are readily distinguished from those in the case at bar. In *Sacharczyk*, it was held that the allowance of rebuttal evidence was improper because the witness there introduced had never been indorsed on the information, no explanation of failure to indorse was given, and the testimony itself was improper as it tended to prove surrounding circumstances of the

crime. A review of the record discloses that Tischia Lazaros had been indorsed on the information and the testimony elicited was rebuttal of defendant's earlier testimony. Furthermore, the rule in Michigan places the question of whether to allow rebuttal evidence within the discretionary powers of the trial judge, and this will not be disturbed unless clearly abused. *People v. Chimovitz* (1927), 237 Mich. 247; *People v. Delano* (1947), 318 Mich 557. The testimony in question does not add anything new, but merely corroborates the earlier testimony of Nicholas Lazaros. The record also evidences the fact that the trial judge instructed members of the jury not to give undue weight to Mrs. Tischia Lazaros' testimony due to her position in the list of witnesses. Explanation was also given as to why the particular witness had not testified earlier and assurances were made by the prosecution that the situation had been corrected.

In *People v. Leonard E. Smith* (1968), 15 Mich App 173, this Court, citing *People v. Cox* (1888), 70 Mich 247, ruled on the reception of rebuttal evidence which should have been brought out on direct examination. It was held therein that the reception of testimony on rebuttal which should have been offered on direct examination is within the discretion of the trial court, unless such discretion is clearly abused. It was further held that where the testimony in question merely expands or supports previously admitted testimony, it is not prejudicial. Hence, we find the decision of the trial court in admitting the woman's testimony to be reasonable and for the reasons delineated above, reversible error was not committed in the particular instance.

The next issue to be considered is whether the trial court erred in not admitting the testimony of two witnesses to contradict the testimony of Peter and Delores Lazaros. Defendant argues that one of these witnesses would have

testified to the effect that Mrs. Lazaros had stated that her husband had threatened to kill her and this would have been demonstrative of the fact that she was testifying out of fear of her husband. Defendant further argues that the testimony of the other witness would have lent support to his theory that Lazaros was attempting to snare defendant in a network of lies. The people rely on the trial court's reasoning that the testimony of the two witnesses only attempts to impeach on a collateral matter and does not show any scheme or design or bias by the prosecution's witnesses in testifying as they did.

It is evident that the trial court was correct in its ruling since defendant has not substantiated his argument that the testimony of these witnesses would show the interest or bias of the complaining witness and her husband, and it appears merely to be an attempt at impeachment on a collateral matter. The reasons why Peter Lazaros might falsely testify about defendant were before the court as a result of other testimony and, in addition, the fact that Mrs. Lazaros had started divorce proceedings against her husband was brought before the jury on cross-examination. The trial court has wide discretion in this area as exemplified by *People v. MacCullough* (1937), 281 Mich 15, where the Court stated:

> "The discretion of the trial court upon the subject of cross-examination on collateral matters is not subject to review unless it is shown to have been grossly and oppressively abused. So far as the cross-examination of a witness relates either to facts at issue or relevant facts, it is a matter of right; but when its object is credibility of a witness, its method and duration are subject to the discretion of the trial judge and unless abused, its exercise is not the subject of review."

Therefore, this Court finds that the answer of a witness on cross-examination as to a merely collateral matter becomes binding upon the cross-examiner and may not be contradicted through introduction of further testimony of other witnesses regarding these collateral matters.

Last, defendant asserts that it was unduly prejudicial to his cause not to postpone the trial until the complainant had given birth to her child. He contends that having to cross-examine an obviously pregnant woman before the jury created sympathy among the jurors and denied him a fair trial. We cannot accept defendant's argument, for the law in Michigan is quite clear that a continuance is a matter of discretion with the trial court. The court had good reason for denying the continuance in that considerable delay had already surrounded the proceedings and some of the prosecution's witnesses wanted to leave the country. In *People v. O'Leary* (1967), 6 Mich App 115, this Court was faced with a similar situation where the complaining witness in an involuntary manslaughter case was pregnant and a continuance was denied by the trial court. This Court affirmed the decision, stating that such matters were discretionary and no abuse existed. In the instant case, we cannot find that the lower court abused its discretion in denying the continuance.

In each of the issues raised on this appeal, it seems eminently clear that the trial court's rulings were fair and based upon established law. The lower court must be upheld since, in light of CL 1948, § 769.26 (Stat Ann 1954 Rev § 28.1096), it does not "affirmatively appear" that there has been a "miscarriage of justice".

Affirmed.

APPENDIX B

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(Michigan Supreme Court No. 52,848)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 16th day July in the year of our Lord one thousand nine hundred and seventy.

Present: The Honorable Thomas E. Brennan, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Paul L. Adams, Thomas G. Kavanagh, Associates Justices.

On order of the Court (T. G. Kavanagh, J., dissenting), the application for leave to appeal is considered, and the same is hereby denied, for the reasons that defendant and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 16th day of July in the year of our Lord one thousand nine hundred and seventy.

Harold Hoag,
Deputy Clerk.

(Seal)

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Joseph Barbara, Jr., Petitioner, v. Perry Johnson, Warden, State Prison of Southern Michigan, Respondent.	Civil No. 35321

OPINION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

At a session of said court, held in the Federal Building in the City of Detroit, Michigan, on December 9, 1970.

Present: The Honorable Fred W. Kaess, United States District Judge.

Petitioner, who was convicted in the Oakland County Circuit Court and sentenced to the custody of the Michigan Department of Corrections for a term of not less than seven and not to exceed twenty years, for the crimes of rape and extortion, is presently incarcerated in the Southern Michigan State Prison at Jackson, Michigan. The instant petition for habeas corpus was filed on behalf of petitioner by retained counsel, who also represented petitioner in the state proceedings.

The record reveals that petitioner has exhausted his available State remedies.

Counsel for petitioner alleges that several unresponsive statements uttered by two prosecution witnesses in the

presence of the jury, during the course of petitioner's cross-examination, deprived petitioner of his constitutional right to a fair trial by an impartial jury. The objectionable remarks concern references that the petitioner and his attorneys were connected with the Mafia. The actual word "Mafia" was interjected into the trial proceedings on only one occasion, however, there was several alleged related references to "these people" and "your people" and "them".

The record further reflects that each time defense counsel objected to the extraneous remarks, the objectionable statements were stricken from the record, accompanied by cautionary instructions from the court directing the jury to neither grant credence to such testimony nor to consider such testimony as evidence against the petitioner.

In this present petition the court is asked to review admittedly objectionable testimony and to determine whether the trial court's cautionary instructions sufficiently purged such testimony of its prejudicial effect.

While there are a multitude of opinions concerning objectionable testimony and instructions to disregard, the rationale employed in determining whether the improperly admitted testimony was so highly prejudicial as to warrant a mistrial is as varying and different as the number of cases. There is, however, a prominent thread of guiding principle frequently woven into the fabric of cases of this nature which generally states that improper testimony is presumed to be cured by judicial instruction, except when the objectionable testimony is inherently prejudicial or inflammatory.

In attempting to calculate the amount of harm incurred by the petitioner from the objectionable statements, the reviewing court must make some analysis of the atmosphere and proceedings in the lower court. There cannot be a

more difficult task. In essence, the judge sitting in review is asked to make a subjective decision regarding the trial atmosphere based solely on the objective facts of the trial record. As both the petitioner and the respondent suggest in their supporting briefs, the "cold record" can never accurately reflect the circumstances surrounding the introduction of harmful testimony.

Nevertheless, the transcript does show that the trial, for the parties and witnesses, was an emotional affair involving extortion from and the rape of a man's wife by an alleged close friend of the husband, while the husband was in prison. In an emotional trial of this nature spontaneous, unresponsive, statements are extremely likely, if not imminent. The fact that a witness volunteers an improper or irrelevant answer should not become grounds for reversal, absent a showing that the unauthorized remark affected the substantial rights of the accused.

It is also obvious from the trial transcript that the judge and the attorneys were fully aware that parties involved in the trial had been widely publicized in the local newspapers as members of the Mafia. Apparently knowing of these reputations, the judge had the primary witnesses instructed not to mention the word "Mafia" unless directly asked a question which would require use of the word in their answer (Trial Transcript, p. 175). Despite the temperamental nature of the prosecution witnesses and the knowledge of their alleged association with the Mafia, the defense counsel on cross-examination proceeded to question these witnesses about certain incidents in which they, as members of the Mafia, had supposedly been involved. At times the repeated probing by defense counsel into these collateral matters resulted in heated exchanges between himself and the prosecution witnesses. Clearly, it is ar-

guable that, in light of this antagonistic cross-examination, the petitioner may have invited error and may be at least partially responsible for any prejudice that may have survived the instructions of the trial court.

There are on record many cases involving the objectionable and prejudicial remarks of prosecution witnesses, given in response to questions propounded by a government prosecutor. Frequently these cases require the declaration of a mistrial as the only remedy by which to insure that the defendant will receive a fair trial. In the case at bar we are not reviewing the conduct of an over-zealous government prosecutor or unauthorized remarks elicited by the government during direct examination of one of its own witnesses. Rather, the petitioner in this action is seeking the declaration of a mistrial because his cross-examination of the government's witnesses brought to the jury that which the court had purposely attempted to exclude.

The petitioner appears to be asking this court to conclude that the mere mention or suggestive association of an accused with the Mafia results in incurable prejudice and the automatic declaration of a mistrial. However, there appears to be no case authority directly in point to support such a position.[1] Moreover, to rule that the word "Mafia" is inherently prejudicial would mean that trial advocates, purposely or otherwise, could easily elicit a "Mafia" response during the examination of a witness and thereby automatically obtain a mistrial. Thus this court is loathe to accept the proposition that the word "Mafia" possesses the magical quality of ipso facto incurable prejudice when injected into trial testimony. For there looms in the back-

[1] However see under *States v. Rubino*, 431 F.2d 284 (6 Cir. 1970); and *United States v. Lazaros*, 425 F.2d 638 (9th Cir. 1970, at p. 641).

ground of such a proposition the distinct possibility that a remedy originally conceived as a sword of truth could become a weapon for injustice.

However, in the instant case there is far more than the mere reference to petitioner's alleged connections with the "Mafia".

In this case, prior to the witnesses taking the stand, the court specifically had them instructed as to the impropriety of such testimony. Further, the record reflects that in the wake of the court's sustaining a defense objection and cautioning the jury, the prosecution witness persisted with additional references to "these people", "your people", and "them", thus paying no heed to the court's ruling. Clearly this indicates more than a mere slip-of-the-tongue reference to the "Mafia". It is more than an emotional response resulting from intense cross-examination. And, most importantly, it is more than could be cured by *any* trial court's instructions to the jury.

It is always with great hesitation and only after most arduous deliberation that a reviewing court will reverse the discretionary rulings of a trial court—particularly in view of the fact that it is the trial judge who observes the atmosphere in the court room with the totality of circumstances which are incapable of being preserved in any trial transcript. However, in the case at bar the repeated references to the "Mafia" from uncontrollable witnesses whose testimony was supported by little corroborative evidence brought prejudicial pressures to bear upon the jury which overwhelmed the court's ability to effectively counteract by cautionary instructions.

Thus, it is not the ruling of this court that the mere mention or suggestive association of an accused with the "Mafia" results in incurable prejudice. This opinion is

limited to the particular facts and circumstances of the case at bar as previously noted, which prejudiced the jury beyond judicial cure.

For the reasons stated, the court finds petitioner is being held in violation of his constitutional rights, and it is therefore ordered that petitioner be released from custody, unless he is granted a new trial within sixty days, during which new trial the testimony discussed herein shall not be used.

Fred. W. Kaess
United States District Judge

APPENDIX D

No. 71-1029

UNITED STATES COURT OF APPEALS
FOR THE 6th CIRCUIT

Joseph Barbara, Jr., *Petitioner-Appellee,* v. Perry Johnson, Warden of the State Prison of Southern Michigan, *Respondent-Appellant.*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed October 19, 1971.

Before: Phillips, Chief Judge and Brooks and Kent, Circuit Judges.

Brooks, Circuit Judge. This is an appeal from an order of the District Court granting a writ of habeas corpus to petitioner-appellee, Joseph Barbara, Jr. Barbara was convicted in the state court of the crime of extortion and his conviction was affirmed on appeal. *People v. Barbara*, 23 Mich. App. 540, leave to appeal denied July 16, 1970, 179 N.W.2d 105. Barbara then petitioned the District Court for a writ of habeas corpus alleging that his constitutional right to a fair trial had been violated. Specifically, Barbara contended certain unresponsive answers made during this trial by two prosecution witnesses on cross-examination tended to connect him with the Mafia. He argued the answers were so prejudicial as to deny him a fair trial by an impartial jury. The State of Michi-

gan maintained that Barbara's attorney deliberately asked questions calculated to bring out references to the Mafia for the purpose of inviting error and a mistrial. Also, it maintained that no prejudice resulted from the references that were allegedly provoked and that the jury was properly instructed to disregard any such references as may have indicated any prejudicial tendency. In holding petitioner's constitutional due process rights were violated, the District Court ruled that the cumulative effect of the references was inherently prejudicial and not cured by the trial court's cautionary instructions to the jury to disregard them. We disagree and reverse.

The two principal witnesses for the prosecution in the state court were Mrs. Delores Lazaros and her husband, Peter Lazaros, who allegedly was a close friend of petitioner. Mrs. Lazaros testified that while her husband was in prison, Barbara came to her home on several occasions and, by threatening her life and the lives of her husband and their infant son, succeeded in raping and extorting money from her. Upon the release of her husband from prison, she told him of the incidents and together they informed the authorities resulting in Barbara's indictment, trial and conviction.

Both Barbara and Lazaros had previously been widely publicized in the local press as members of the Mafia, and their reputations were well known to the trial judge and the attorneys. It was for this reason that the trial judge had the witness instructed before they testified not to mention to word "Mafia" unless directly asked a question which would require its use. The word "Mafia" was mentioned one time during the course of the trial that lasted for 8 days, and there were also other references such as "these people", "your people", "them", and the name of a well publicized Mafia informer was mentioned. It is upon

these testimonial responses that petitioner relies to support the contention that he was deprived of a fair and impartial trial.

During trial Lazaros was subject to a lengthy, severe and often abusive cross-examination. Late in the cross-examination defense counsel, with full knowledge of his client's and Lazaros' alleged association with the Mafia, probed him concerning the collateral issue of petitioner's allegedly bribing Internal Revenue agents and also the Mayor of Detroit.[1] Lazaros' response mentioned the word "Mafia" and immediately a motion was made for a mistrial. The judge struck the answer and admonished the jury to disregard it. In denying the motion, he said out of the presence of the jury " . . . this word that we're concerned with has not been emphasized before this jury. This Court is of the opinion that the action of this Court in striking the answer . . . has protected the rights of this defendant. I'm satisfied that this jury will follow the Court's instructions." The trial judge also, at appropriate times, instructed the jury to disregard other irrelevant and volunteered responses of the witnesses.

---

[1] "Q. All right. Isn't it true that you've made other accusations against Mr. Barbara, other than the accusation here made by your wife?

A. What you mean by that? Will you explain to me?

Q. Yes, I'll be happy to. Isn't it true that you have made a statement or statements, to certain law enforcement agencies, that at the Kingsley Inn, on or about December the 17th of 1967, Mr. Barbara paid a bribe, not only to certain Internal Revenue agents, but also to Mayor Cavanagh of the City of Detroit?

A. Let me say this to you, while you want to know [defense counsel], Mr. Barbara, at that time he delivered the money, representing the Mafia, to give—

[Defense counsel] All right, your Honor, I move for a mistrial.

A. You asked me."

As the record discloses, the crime for which petitioner was convicted with all its sordid details, the association of petitioner and Lazaros with the Mafia, their backgrounds, temperaments and reputations, the antagonism existing between Lazaros and defense counsel, who at one time had represented him, all contributed to create a trial charged with emotion. In such a setting, and even without provocation, spontaneous and unresponsive statements may be all but impossible to prevent. With provocation they are to be expected.

The trial strategy adopted by the defense was inherently provocative. Its aim was to completely destroy the credibility of the two principal witnesses for the prosecution. And in attacking their credibility, evidence was induced, primarily on the cross-examination of Peter Lazaros, of numerous collateral matters[2] which had no direct application to the crime of extortion for which petitioner was being tried. This evidence of collateral matters, however, successfully portrayed petitioner and Lazaros as being sinisterly linked with organized crime. Thus, a substantial doubt is presented as to whether the fleeting references to the Mafia could reasonably be presumed to have deprived petitioner of a fair trial, even in the absence of cautionary instructions.

The general rule is that the subsequent striking of erroneously admitted evidence accompanied by a clear and positive instruction to disregard it cures the error unless the evidence is of such an exceptionally prejudicial character that its withdrawal from the consideration of the jury cannot remove the harmful effect caused by its admission.

---

[2] e.g. Threats to kill; bodyguards; bribery; $130,000 swindle; blackmail; legal fees paid of $150,000, $200,000; and intimations of alleged judicial improprieties in high places.

Bruton v. United States, 391 U.S. 123 (1968); *United States v. Greene,* 400 F.2d 847, 848 (6th Cir. 1968); *United States v. Farber,* 336 F.2d 586, 589 (6th Cir. 1964); *United States v. Levinson,* 405 F.2d 971 (6th Cir. 1968), *cert. denied Strang v. United States,* 395 U.S. 906 (1969); *cert denied Howard v. United States,* 395 U.S. 958 (1969); and *Levinson v. United States,* 395 U.S. 958 (1969), *rehearing denied,* 396 U.S. 869 (1969). The rationale for the general rule is set forth in *Bruton v. United States, supra,* at page 135:

> "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, ushally inadvertently. 'A defendant' is entitled to a fair trial but not a perfect one.' *Lutwak v. United States,* 344 U.S. 604, 619; see *Hopt v. Utah,* 120 U.S. 430, 438; cf. Fed. Rule Crim. Proc. 52(a). It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in *Jackson v. Denno,* supra, [378 U.S. 368], there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

The authorities also agree, particularly where the allegadly prejudicial evidence came through or was provoked by the prosecution, the burden of establishing that the accused was unafirly treated rests upon the accused. *United States ex rel. Darcy v. Handy,* 351 U.S. 454, 462 (1956); *Adams v. United States ex rel. McCann,* 317 U.S. 269, 291

(1942); *United States v. Rubino*, 431 F.2d 284 (6th Cir. 1970). And as stated in *United States ex rel. Darcy v. Handy, supra*, at page 462, it is necessary "... that it [the burden of proof] be sustained not as a matter of speculation but as a demonstrable reality."

Applying these rules to the bizarre circumstances of this case and having considered the complete transcript of the trial, we conclude as did the state judge and the Michigan Supreme Court that even if the challenged testimony could be deemed prejudicial, its effects were cured by the cautionary instructions of the court. Petitioner has failed to establish that he was deprived of his constitutional right to a fair trial.

The order granting the writ of habeas corpus is vacated and this proceeding is remanded to the District Court with instructions to dismiss the petition.

APPENDIX E

ORDER DENYING PETITION FOR REHEARING

U.S. Court of Appeals—Sixth Circuit

(Filed Nov. 19, 1971)

Joseph Barbara, Jr.,
Petitioner-Appellee,
v.
Perry Johnson, Warden of the State Prison of Southern Michigan,
Respondent-Appellant.

ORDER
No. 71-1029

Before: PHILLIPS, Chief Judge, and BROOKS and KENT, Circuit Judges

The petition of the petitioner for rehearing en banc has been considered. None of the judges of this Court who are in regular active service has favored ordering consideration en banc.

It is ordered that the petition is denied.

Entered by order of the Court
James A. Higgins,
Clerk.

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No. 71-802

UNITED STATES OF AMERICA

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

JOSEPH BARBARA, JR.,

Petitioner,

vs.

PERRY JOHNSON, WARDEN, of the State Prison of Southern Michigan,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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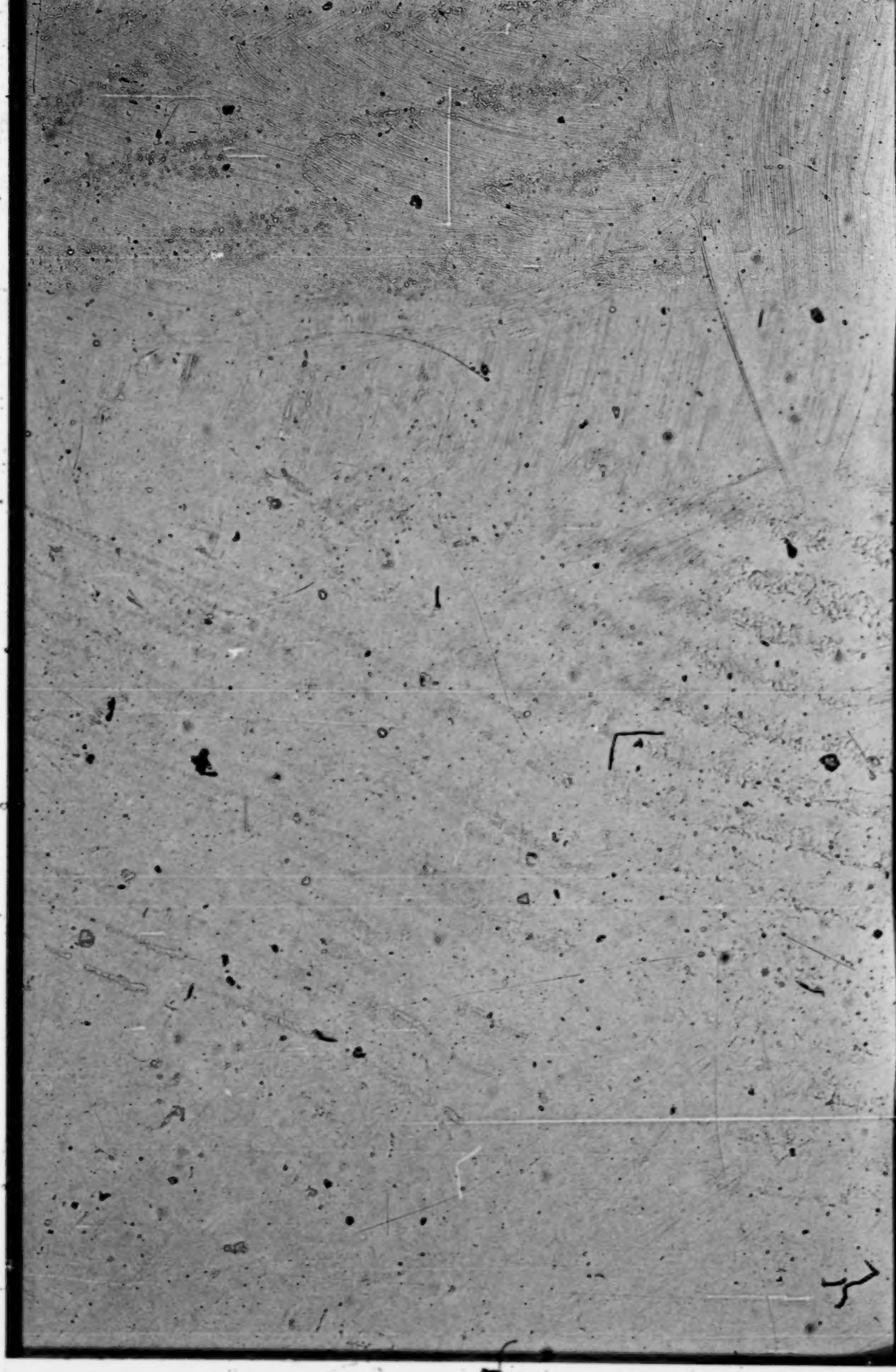

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The Prosecution Witness's Unresponsive, Irrelevant, Spontaneous, And Voluntary Answers, Elicited By Defense Counsel Upon Cross-Examination, Which Implied That Defendant And His Attorneys Were Connected With The Mafia Were Not So Inherently Inflammatory Or So Prejudicial As To Cause Reversible Error Where The Trial Court Sufficiently Instructed The Jury To Disregard Such Utterances, Thus Curing The Possibility Of Prejudice To Defendant 1,2

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COUNTERSTATEMENT OF QUESTION PRESENTED

DID THE INTERJECTION BY WITNESS PETER LAZAROS OF EXTRANEOUS MATTERS, IN THE PRESENCE OF JURY, IN RESPONSE TO QUESTIONS ASKED BY DEFENSE COUNSEL UPON CROSS-EXAMINATION, DEPRIVE PETITIONER JOSEPH BARBARA, JR., OF A FAIR TRIAL IN HIS STATE COURT PROSECUTION WHEREIN HE WAS CHARGED WITH EXTORTION OF MRS. PETER (DELORES) LAZAROS?

The Trial Judge said "NO"

The Michigan Court of Appeals said "NO"

The United States District Court said "YES"

The United States Court of Appeals said "NO"

The State contends that the answer should be "NO"

No. 71-802

UNITED STATES OF AMERICA

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

JOSEPH BARBARA, JR.,

Petitioner,

vs.

PERRY JOHNSON, WARDEN, of the State Prison of Southern Michigan,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The State of Michigan accepts the Petitioner's Statement of the Case.

ARGUMENT

THE PROSECUTION WITNESS'S UNRESPONSIVE, IRRELEVANT, SPONTANEOUS, AND VOLUNTARY ANSWERS, ELICITED BY DEFENSE COUNSEL UPON CROSS-EXAMINATION, WHICH IMPLIED THAT DEFENDANT AND HIS ATTORNEYS WERE CONNECTED WITH THE MAFIA WERE NOT SO INHERENTLY INFLAMMATORY OR SO PREJUDICIAL

AS TO CAUSE REVERSIBLE ERROR WHERE THE TRIAL COURT SUFFICIENTLY INSTRUCTED THE JURY TO DISREGARD SUCH UTTERANCES, THUS CURING THE POSSIBILITY OF PREJUDICE TO DEFENDANT.

In his opinion, the District Judge stated:

> "...The fact that a witness volunteers an improper or irrelevant answer should not become grounds for reversal, absent a showing that the unauthorized remark affected the substantial rights of the accused ..." (Petition, 45).

Thus, the question presented below, as here, was whether substantial rights of the petitioner were prejudiced by the unresponsive answers elicited by defense counsel on cross-examination. The Michigan Court of Appeals held that the trial court's instructions had cured the possibility of prejudice. The District Judge disagreed and held that no instruction could have cured the possibility of prejudice in this trial. The United States Court of Appeals for the Sixth Circuit reversed and specifically held that "even if the challenged testimony could be deemed prejudicial, its effects were cured by the cautionary instructions of the court." (Petition, 54).

In the context of *this* trial, when viewed in light of the trial judge's instructions, the State contends that the unresponsive remarks were neither reversible error nor a ground for the granting of habeas corpus. The State, in this appeal, relies primarily upon the cogent and clear reasoning of Judge John W. Fitzgerald, Chief Judge Pro Tem of the Michigan Court of Appeals, in his opinion in this cause. See, *People v. Joseph Barbara, Jr.* (1970), 23 Mich App 540. The State further contends that Judge

Fitzgerald's approach and reasoning is also the Federal approach as stated in the opinion of Chief Judge Phillips in *United States v. Rubino* 431 F.2d 284 (6 Cir. 1970), and as adopted by the Ninth Circuit in *United States v. Ruby Lazarus*, 425 F.2d 638 (9 Cir. 1970).

The nature of the issues presented in this appeal require a somewhat unorthodox approach to the matter. The facts of the events are basically agreed upon. The dispute in this case concerns the legal consequences of those facts. In the first 5 pages of his opinion, the learned District Judge stated — without citation of authority — his view of the law on this question. The State of Michigan has no specific exception to the law as stated by the judge. Rather, the thrust of this appeal is at the application of that law — as stated by the judge — to these facts. Quite obviously, if faced with the situation here involved *while sitting as a trial judge,* Federal Judge Kaess would have granted a mistrial. But Judge Kaess was *not* the State trial judge — his scope of review was rather that of a Federal judge examining a State court record to determine if the State trial judge had violated the Constitution of the United States in refusing to grant a mistrial. The State trial judge who had observed the incident in question — and who could hear the inflection of the voices and observe the demeanor, facial and hand expressions — ruled that a proper instruction to the jury was sufficient to protect the rights of the accused. On this appeal, it is the position of the State of Michigan that in so ruling the State trial judge did not violate any Federally protected right of the accused.

Opinion of the State Trial Judge

In denying the motion for a mistrial, the State trial judge said (Tr 228-229):

"...

"Concerning the motion for a mistrial, concerning the use of the word 'Mafia' by the witness, Peter Lazaros, the issue, as I see it, is whether the use of that word has so prejudiced this jury, that this defendant cannot receive a fair trial.

"I've carefully considered this motion for a mistrial. I've had the reporter re-read the question and answer, and, in my opinion, there's no question it would have been better had that word been left unsaid, and there's no question that, through counsel, I have told counsel to tell the witnesses not to use that word unless it's in direct response to their questions — again, I say it certainly would have been better if that word had not been said, but that whole answer to that whole question has been stricken from the record, and the jury has been ordered to disregard the whole answer. I purposely gave no reason to the jury, because that would just emphasize what we were talking about. And this word that we're concerned with has not been emphasized before this jury.

"This Court is of the opinion that the action of this Court in striking the answer, in my opinion, has protected the rights of this defendant. I'm satisfied that this jury will follow the Court's instructions. And I did not refer, specifically, to that word. I referred to the whole answer, which was a long answer.

"This Court is of the opinion that although it would have been better had this word been left unsaid, nevertheless, its use has not so prejudiced this trial that this defendant could not receive a fair trial. And, on the contrary, this Court has made and will make every effort to guarantee a fair trial to this defendant.

"For the foregoing reasons, the motion for mistrial is denied."

Opinion of the Michigan Court of Appeals

In reviewing this action of the State trial judge, the Michigan Court of Appeals said:

"....

"Several issues are raised on this appeal; the first concerns the question of whether the continuous injection by witnesses Peter and Delores Lazaros of extraneous matters in the presence of the jury deprived defendant of his right to a fair trial by an impartial jury. The allegedly prejudicial matters concern references made which imply that defendant and his attorneys were connected with the 'Mafia', thus inferring a guilt by association. Defendant argues that in light of the remarks made, the judge's instructions to the jury, striking all references to the above subject, were not sufficient because of the inflammatory nature of these utterances.

"The people argue that defendant's attorneys deliberately phrased questions which were calculated to bring out references to the 'Mafia', thus inviting error for purposes of having a mistrial declared.

"In *People v. Wolke* (1968), 10 Mich App 583, this Court addressed itself to questionable evidence injected into a trial. The Court discussed the question of when objectionable evidence will be held to so prejudice a jury that a new trial must be granted. In analyzing the applicable authorities, it was found that two standards exist; namely, that once a prejudicial remark is made, the 'ink spot' may not be blotted from the minds of a jury by express instructions. On the other hand, recognition was also given to a line of cases which presumed that a jury considers only the testimony permitted by a court to stand. This Court held that the choice of which standard to apply ultimately rests upon the degree of prejudice generated by the objectionable evidence. Only if the testimony is inherently prejudicial or inflammatory will there be an 'ink spot' on the minds of the jurors which cannot be erased. In the case at bar, we are dealing with unresponsive, irrelevant, and spontaneous answers volunteered by two witnesses. In 2 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 600, p 778, it is stated:

> " 'Error cannot be predicated upon the fact that a witness gives an improper or irrelevant answer where the question was a proper one and neither the court nor counsel was at fault. Improper testimony offered by a witness and promptly struck out by the court on objection is not reversible error. *** A witness cannot put error into a case by an unauthorized remark, neither called out by a question nor sanctioned by the judge; and if what he says or does improperly is likely to do much mischief, it is presumed that the judge will apply the proper corrective measures in his instructions if requested to do so.'

"A review of the problem with which we are faced leads to the inescapable conclusion that if error could be easily predicated on the improper utterances of a witness,. it would be most difficult ever to conduct a proper trial. *People v. Droste* (1910), 160 Mich 66.

"Unresponsive answers, irrelevant in nature alone, are not sufficient to cause reversible error. The instructions to disregard the utterances made were quite sufficient to instruct the jury on those matters not properly before them and cured the possibility of prejudice to defendant."

Opinion of the United States District Judge

In granting a writ of habeas corpus to this State prisoner, the Court said (29a-33a):

"...

"... improper testimony is presumed to be cured by judicial instruction, except when the objectionable testimony is inherently prejudicial or inflammatory.

"...

"... the transcript does show that the trial, for the parties and witnesses, was an emotional affair involving extortion from and the rape of a man's wife by an alleged close friend of the husband, while the husband was in prison. In an emotional trial of this nature spontaneous, unresponsive statements are extremely likely, if not imminent...

"... Despite the temperamental nature of the prosecution witnesses and the knowledge of their alleged association with the Mafia, the defense counsel on cross-examination proceeded to question these witnesses about certain incidents in which they, as members of the Mafia, had supposedly been involved. At times the repeated probing by defense counsel into these collateral matters resulted in heated exchanges between himself and the prosecution witnesses. Clearly, it is arguable that, in light of this antagonistic cross-examination, the petitioner may have invited error and may be at least partially responsible for any prejudice that may have survived the instructions of the trial court.

"... In the case at bar we are not reviewing the conduct of an over-zealous government prosecutor or unauthorized remarks elicited by the government during direct examination of one of its own witnesses. Rather, the petitioner in this action is seeking the declaration of a mistrial because his cross-examination of the government's witnesses brought to jury that which the court had purposely attempted to exclude.

"...

"In this case, prior to the witnesses taking the stand, the court specifically had them instructed as to the impropriety of such testimony. Further, the record reflects that in the wake of the court's sustaining a defense objection and cautioning the jury, the prosecution witness persisted with additional references to 'these people,' 'your people,' and 'them,' thus paying no heed to the court's ruling. Clearly this indicates more than a mere slip-of-the-tongue refer-

ence to the 'Mafia.' It is more than an emotional response resulting from intense cross-examination. And, more importantly, it is more than could be cured by *any* trial court's instructions to the jury."

In the context of these conflicting rulings lies the focal point of the inquiry. The State courts, in substance, held that the remarks of witness Lazaros, while certainly objectionable, were not a sufficient basis for a mistrial if proper precautionary instructions were given. Implicit in the approach of the State courts is the view that repeated probing by defense counsel into collateral matters involving the Mafia had precipitated the offensive remarks. The District Judge, on the other hand, felt that these unresponsive answers were "more than an emotional response resulting from intense cross-examination." (Petition 47). As correctly noted by the Sixth Circuit, there is no foundation in the record for the District Judge's finding.

The State contends that the District Judge disregarded several extremely important aspects of the cross-examination of this witness. The entire colloquy at issue is reproduced below. We would stress at the outset that the trouble began *when defense counsel asked the witness about* an alleged bribe paid to Federal officers and to the Mayor of Detroit — a matter wholly collateral to the case being tried and a matter *which was without any foundation or reference whatsoever in the record of this case.* Defense counsel was obviously probing for a reference to the "Mafia" and when he got what he wanted, he promptly "grand-standed" by moving for a mistrial in the presence of the jury. It should also be noted at the outset that the witness (who had been instructed not to use the word "Mafia" unless specifically asked a question which involved the necessity of so answering) was at first eva-

sive — defense counsel had to literally drag the answer out of him (Tr 171-Tr 175):

"Q. All right. Isn't it true that you've made other accusations against Mr. Barbara, other than the accusation here made by your wife?

A. *What you mean by that? Will you explain to me?*

Q. Yes, I'll be happy to. Isn't it true that you have made a statement or statements, to certain law enforcement agencies, that at the Kingsley Inn, on or about December the 17th of 1967, Mr. Barbara paid a bribe, not only to certain Internal Revenue agents, but also to Mayor Cavanagh of the City of Detroit?

A. Let me say this to you, while you want to know, Mr. Barris, Mr. Barbara, at that time he delivered the money, representing the Mafia, to give —

MR. BARRIS: All right, your Honor, I move for a mis-trial.

A. *You asked me.*

MR. BARRIS: I didn't ask for that at all, your Honor, I want to excuse the jury.

THE COURT: Escort the jury into the juryroom.

(Jury leaves the courtroom)

THE COURT: The record may show the jury is not in the courtroom.

MR. BARRIS: Your Honor, the question I asked him could have been answered yes, no, or I don't remember. Here, Mr. Lazaros, for obvious reasons, injected the Mafia. Here, again, it isn't Mr. Bain's fault, he can't control this man and I don't think anybody else can.

THE COURT: Now, in response to one of your questions in chambers, I asked counsel to warn all witnesses not to use that term unless it was directly asked. Did you so indicate?

MR. BAIN: I certainly did.

MR. BARRIS: I think this is a cool, calculated effort on the part of this man, who will stop at nothing to further prejudice Mr. Barbara. He's so smart, he's now done the very thing he didn't want to occur. But in any event, I think this is irreparable. It's something that was volunteered, and I don't know where anything else, other than a mis-trial, could cure this thing. And it's only — we've only been in this trial a day. It isn't like we've spent three weeks.

THE COURT: Would you read the question and answer back?

(Reporter reads back the question and answer)

MR. BAIN: Now, if I might respond, as your Honor well knows, in chambers I was directed to instruct Mr. Lazaros and his wife not to use the word Mafia. I did this in the witness room in the presence of Detective Aird and others. But I think Mr. Barris has purposely gone into the area. He's asked him regarding the allegation that Joe Barbara made cer-

tain pay-offs which, quite frankly, I knew nothing about prior to today. And if this allegation was made, if the question had not been answered here by Mr. Lazaros, I think, certainly, after he had gone into it, then I would have a right to ask, on re-direct, on whose behalf this money was paid. And I think, for that reason, that your Honor should not declare a mis-trial. It may be inadvertent. He has said it at this time. I think, certainly, on re-direct, after we go into this area, I would have a right to ask on whose behalf the money was paid.

MR. BARRIS: Well, your Honor, I'm sure it wasn't inadvertent. No more inadvertent than when he called me Mr. Louisell. This is a cool, calculated effort, by that man — I don't mean Mr. Bain, I wouldn't saddle Mr. Bain with this man in a million years — a cool, calculated effort to prejudice this man in the eyes of the jury. It wasn't called for at all, by an answer. All he had to do is say 'yes', 'no', or 'I don't remember.' He didn't have to come up with this word Mafia. In the first place, if he made such an allegation, it would be in connection with certain individuals, not with a group, but that's neither here nor there. I think it's as clear as my rather large proboscis that this man started out rather deliberately to inject that into the record. I'm not even sure he'd deny it if you asked him. This man is bold enough to have done it deliberately. I think he did it deliberately.

THE COURT: Anything further?

MR. BAIN: Nothing further.

THE COURT: I'm going to take the Motion under advisement. Proceed with the trial. And I caution the witness, do not mention that word again unless you are specifically asked a question which involves the necessity of so answering. Do you understand?

A. Yes, your Honor.

THE COURT: All right. Return the jury. I'll take the motion under advisement.

(Jury returns to the courtroom)

THE COURT: The last answer to the last question is stricken, and the jury is instructed to disregard it. You may proceed."

(Emphasis added)

The State asks this Court to note that, although the trial court first indicated that its chambers instruction to counsel (to relay to witnesses, which the Prosecutor did) was "not to use that term unless it was directly asked," the true ruling is stated when the judge, immediately thereafter (T. 175) instructed Lazaros not to "mention that word again *unless you are specifically asked a question which involves the necessity of so answering.*"

We have underlined two of Lazaros' answers which indicate that he understood he was asked a directly related question. He responds to defense counsel's motion for mistrial (in the *presence* of the jury) by stating: "You asked me." More significantly, *before* he answered, Lazaros [to us, in disbelief] parried defense counsel's preceding question (which, we will show, directly inveighed upon the "Mafia" area) by a question of his own: "What you mean by that? Will you explain to me?"

The point is this. Defense counsel surely knew, in addition to his knowledge from case preparation, that the witness was notoriously and repeatedly press-identified as "Peter Lazaros, self-styled Mafia money-man," and that his principal alleged (by him) connection with public officials was to "pay them off" for the Mafia. More importantly, defense counsel certainly knew that, apart from Barbara's alleged extortion-rape of Mrs. Lazaros, the only "other accusations" Lazaros (a former close associate of Barbara) made against Barbara were that Barbara made or assisted in some of these Mafia gratuities or "bribes" (the word is defense counsel's). Surely, when the area was thus deliberately invaded, the already self-discredited Lazaros did not have to incur further abasement by answering in such a way as to permit any unfair inference that Barbara (a close associate in whose company he was at the time) was paying the "bribe" on behalf of Barbara *and* Lazaros, or possibly for Lazaros himself. Trial-prosecutor Bain appears to have stressed the latter aspect of the situation, contending that had Lazaros answered the question without disclosing the actual "bribe" source, he (Bain) could have properly inquired as to the source upon re-direct examination. While we entirely agree with such position, our more basic argument (probably implicit in that of Mr. Bain) is that Lazaros' "Mafia" answer was, in the total context, quite plainly invited by defense-counsel's question.

[It is true, as belatedly then urged by the defense, that the witness could have answered yes or no. However, we find it extraordinary that the only times (three of them) that defense counsel mentioned a yes or no answer, were (like here) *after* some allegedly objectionable answer was already given. *At no time,* although the defense was faced with a rambling and recriminative (perhaps understandably) witness in the person of Mr. Lazaros, did counsel

ever request the trial court (as counsel surely well knew he properly could have done, at least after his earlier exchanges with Lazaros) to answer a question, or questions, yes or no; and then proceed to frame the questions accordingly. We urge that this is significant, particularly in the case of experienced and distinguished counsel.]

Also, it is only fair — even necesary — to consider the confusing situation of Mr. and Mrs. Lazaros as to the "Mafia" factor. Not only was Lazaros (promptly on discharge from prison) allegedly threatened by Barbara (T. 164-166) to be "called to a meeting" [a prime sample of quaint but traditional terminology meaning, "you are out of line, and are going to be taken before a council or some of the leaders"; here allegedly said in conjunction with, "whatever your wife tells you, you better forget about it"], but it also reliably appears that this unique Mafia phenomenon was a very *part of the res gestae of the alleged crime*. For some reason as to which the record is silent, the prosecution did not elicit from Mrs. Lazaros at trial, her preliminary examination testimony that on the very occasion of [immediately following] the second alleged rape, petitioner Barbara, as part of his intimidation and instructions in connection with his violation of her, and his order that she was to "do everything I tell you to do," further directed that if they were ever "called down" to a "meeting", she was not to tell anybody, not to change her "mannerism of being friends", and "to say that he never did anything to me". This proper and admissible testimony appears through four pages (52-55, morning session) of the preliminary examination transcript which is, by Michigan law, part of the file in this case.

Since Mr. Lazaros also knew of the preceding incident [Mrs. Lazaros had told him "everything"], and since he presumably knew that his wife testified to it at examination (though he was excluded from the courtroom), because he accompanied Mrs. Lazaros on the day she so testified, the confused and uncertain state of the minds of these lay witnesses is readily inferable. How could they spontaneously determine, in the setting of any seemingly (to them) Mafia-related question, whether that question "involves the necessity of so answering"? It is obtrusively plain that, to them at least, the entire crime (i.e., extortion, as charged; the contemporaneous alleged rape certainly must be assumed to be personal) *and* case were Mafia-oriented. Their impression in that respect is not without basis, because the Court will remember that Petitioner Barbara, at least allegedly, was *not* primarily interested in the several thousand dollars and jewelry Mrs. Lazaros charged him with taking on the second visit. His *first* inquiries were about the stable of race horses, the title to a place of business, and the deed to the Lazaros' home. He had *first* demanded that Mrs. Lazaros find and give these "papers" to him. We are looking at the state of mind of this Lazaros couple as they seek to determine whether a given question asked on cross-examination, "involves the necessity of so answering." With Lazaros allegedly having handled large sums of "Mafia" money over a long period of time, such ambitious property demands, though personally made by Barbara, may well have assumed a broader and organizational significance. Further substance is lent to the Lazaros' impression by Mrs. Lazaros' testimony (later stricken) at preliminary examination (pp. 37-39, appendix A) that immediately following the alleged rape and other demands on the first "visit," Barbara forced her with him to a telephone, called a number, said "I'm here" when the other party answered, then compelled Mrs.

Lazaros to take the phone, whereupon she was ordered by the other party on the line, a man, to "Stop crying," following which the man identified himself as "Tony Giacalone." All this may have been stricken by the magistrate; it may never have appeared at trial; but it obviously could not be erased from the minds of these witnesses as they sought to phrase their answers (upon cross-examination) in compliance with the aforesaid standard set by the trial judge.

As earlier indicated, only Mrs. Lazaros testified at the Preliminary Examination. However, Mr. Lazaros accompanied her, and though the defense caused him to be excluded from the courtroom (in spite of the fact that it was made clear he was not to testify in that proceeding), we should pertinently remember that the couple was almost constantly together for many months (as the defense brought out in connection with its repeated references to taxpayer-paid State Police bodyguards). In addition, they appear on the record to have been particularly close and mutually loyal. In their immediate circumstances (including mutual involvement and interest in the case), one could not suggest any more unlikely possibility than that

Mrs. Lazaros withheld from her husband the manner and details of her cross-examination by defense counsel [there, Mr. Louisell].

Respectfully referring the Court to Appendix A (transcript of the Preliminary Examination), we shall quote therefrom with appropriate page references (occasionally interpolating our comment in brackets).

[Our first quotation should be preceded by the information that, on the first day of the Preliminary Examination, Mrs. Lazaros was not only the sole witness; she also was

on the stand all day and through the evening. Except for direct examination of approximately one hour, all of that time (less recesses for lunch and dinner) was spent under cross-examination. About 9 p.m. Mrs. Lazaros became so fatigued that she appeared unable even to understand questions, let alone answer them.]

Pages 50 and 51 (of the evening session):

"Q. How long after the second visit to your home was it, before you claim he returned a third time?

A. Oh, maybe it was a week or two, I don't remember. Five days.

Q. If you said two or three days would that be wrong?

A. I don't recall because I'm so exhausted.

Q. You're pretty exhausted?

A. Yes, I am exhausted.

MR. BAIN: Let me ask, Your Honor, that we adjourn this matter. I think it's evident the witness is tired.

"Q. (Mr. Louisell) *Now this is a good time to catch you.* (Emphasis added)

A. To what.

THE COURT: Well, it's a good time when you find some people's minds have been through a lot of strain she has been on the witness stand since a quarter of ten this morning continuously. Her thinking processes do not function as they ought to and

I think that it might be appropriate that we did adjourn. *I would like you two to come up here a minute.*

MR. BAIN: *Your Honor, if you don't mind whatever we say I'd like to have it on the record.* I'm just interested in the talking about the adjournment. *There is no disrespect to your Honor. I would like to put on the record anything that is said then I won't be subjected to any of his remarks on the record.*" (Emphasis added)

Page 74C:

"Q. In addition to the ten to fifteen thousand dollars that *you say* was in the safe, *you say* you had three or four thousand dollars there? (Emphasis added)

A. Where?

Q. I'd like you to tell me, lady, *you're the one that's making up this story.*" (Emphasis added)

Page 68:

"Q. Now, have you ever been arrested and convicted of a crime?

A. No, I have never been convicted or arrested of any crime.

Q. Were you not convicted in the City of Pontiac on a charge of accosting and soliciting?

[Prosecutor's objection overruled]

A. No, I have never been arrested in the City of Pontiac or any other city in this county or any other county for soliciting, prostitution or any other thing.

Q. *That's what you say?*" (Emphasis added)

Pages 93-95:

[The subject of cross-examination here is Mrs. Lazaros' consultation at Kingsley Inn with Attorney John O'Brien, whom she called to meet her there for that purpose.]

"Q. Did you tell this story to Mr. O'Brien at Kingsley Inn?

A. Some of it.

Q. Uh-huh. *Did you tell Mr. O'Brien that you had been — that you'd had intercourse with Mr. Barbara?*

A. Isn't that an attorney-client relationship?

Q. *Are you going to rely on the attorney-client relationship?*

MR. BAIN: I think she has. I think that's all that's necessary. She's asserted the privilege.

THE WITNESS: I think that I had the right to talk to my attorney privately like most people can.

Q. (By Mr. Louisell, continuing): Is Mr. O'Brien here in Court?

A. No, he is not here in Court and I don't —

Q. *Well what did you tell Mr. O'Brien?*

MR. BAIN: Objection, Your Honor. She's indicated that's within the privilege.

THE COURT: She indicated that.

MR. LOUISELL: She hasn't claimed her privilege.

THE COURT: To my understanding she has.

MR. LOUISELL: She just asked me if it falls within the privilege. In the first place I don't believe there is any privilege in this matter.

THE WITNESS: I don't think I have to answer what I told my attorney.

Q. (By Mr. Louisell, continuing): *You don't want to answer that, is that right?*

MR. BAIN: Objection. He's arguing with her." (Emphasis added)

[The obviously critical, if not derisive, tenor or comment, implicit in at least two of the above "questions," plus counsel's contumacious persistance in boldly renewing (with impunity) the same inquiry after adverse ruling by the Court, quite plainly had more than later (at trial) impact upon Mrs. Lazaros. (Understandably, we submit, she came to the trial on edge with a deep resentment deliberately provoked by defense counsel for later exploitation.) At the Preliminary Examination, she appears to have been quite cowed by the preceding episode. Certainly it is significant that the same lady who "successfully" invoked her attorney-client privilege, thereafter proceeded (over many succeeding pages of the record) submissively to answer a complete cross-examination as to details of her professional consultations with four other attorneys. Although defense counsel reviewed the "O'Brien" business at length (pages 7a-21a), and won concession that Mrs.

Lazaros had to disclose what was told Mr. O'Brien in the presence of Mr. Lazaros and/or the State Police, the several colloquies of counsel and rulings of the Court served only to make it all the clearer that she was not obliged to reveal *any* private consultation. Despite this, and although neither Mr. Lazaros nor any police officer (or other person) was present when she consulted the later attorneys, Mrs. Lazaros simply capitulated. She answered everything that was asked. Certainly, if she reached the conclusion that the attorney-client privilege was not worth the trouble and embarrassment of its invocation, one cannot censure her. For, after the O'Brien consultation had been completely (and judicially) resolved as above mentioned, defense counsel contumaciously (and once more with impunity) besieged her again with it as follows (29a):

"Q. In any event he was a person in whom you had great confidence, wasn't he?

A. Was he a person—

Q. In whom you had great confidence?

A. Yes, I did.

Q. And you had confidence in his reliability and in his integrity, is that right?

A. Yes, I did.

[Q. *You never told him anything of this story, did you?* (Emphasis added)]

Page 49a:

[In the presence of Mrs. Lazaros on the stand.]

"Mr. Louisell: *Let this court find out what's been going on in an attempt to frame this man.* Let the court find out." (Emphasis added)

Page 87a:

[In the presence of Mrs. Lazaros.]

THE COURT: And counsel, Mr. Bain, has stipulated that it has been told to them several times.

MR. LOUISELL: Is he under oath?

THE COURT: No, but I'm certain that if you cannot accept the word of Mr. Bain as Prosecuting Attorney for this matter, we are getting in kind of a bad area.

MR. LOUISELL: *Well, Judge, there's this problem. You see, Mr. Bain has acted in several capacities in this case . . .*" (Emphasis added)

Page 113a:

"MR. BAIN: I wonder if counsel might be instructed to *quit yelling* at the witness." (Emphasis added)

[No comment by court or exception by Mr. Louisell.]

Page 114a:

"MR. BAIN: Your Honor, *Counsel is arguing* with the witness." (Emphasis added)

[No comment by court or exception by Mr. Louisell.]

Page 27 (evening session):

"Q. Would you tell us today Mrs. Lazaros that you know of no basis of any ill-feeling between you and Mr. Albert?

A. I'm not — am I supposed to be here to testify against Mr. Albert?

Q. *I don't know what you're here for.*" (Emphasis added)

Page 36 (evening session):

[Mrs. Lazaros finally wearies after interminable questions about her confidential disclosures to numerous attorneys. With the exception of the earlier Attorney O'Brien episode, she has answered everything asked. Now, when defense counsel starts with the same question, namely whether she told Attorney Franklin "the *story* that you told here today," she demurs and declines to answer, making it transparently clear upon the record that she does so because the matter inquired about was a confidential disclosure to Attorney Franklin within the attorney-client relationship. Again, and plainly for no other purpose than the embarrassment, discomfiture, and/or agitation of the witness (because everything truly *was* on the record) defense counsel imposes.]

"Q. *So you're declining to answer the questions with respect to Mr. Franklin invoking your attorney-client privileges?* (Emphasis added)

A. I certainly do.

MR. BAIN: I think she has it on the record that she is invoking it and that is all that is necessary.

MR. LOUISELL: *I need it on the record.*

MR. BAIN: *It's on the record.*

THE COURT: That is all that is necessary.

MR. LOUISELL: *I do need it on the record.*

Q. (Mr. Louisell continuing): *You're invoking your client-attorney privileges?*

A. I most certainly did.

Q. *I just wanted it on the record.*

THE COURT: It's *on* the record." (Emphasis added)

[Nothing changed in the treatment of the witness. Defense counsel, immediately after the above, again asked Mrs. Lazaros, this time with respect to Attorney Crona, whether she told him "the *story* that you *told* on direct examination here today". (Emphasis added). The same question, *verbatim*, was next asked her with respect to Attorney Finn (the last of a number of attorneys consulted in an effort to win Mr. Lazaros' release from conviction-imprisonment).]

Page 44C:

"Q. Is there something different that occurred on that occasion that you told us about two weeks ago?

A. Two weeks ago I didn't discuss it.

Q. *Well, I think that you did, Mrs. Lazaros.*" (Emphasis added)

Pages 55 and 56 (evening session):

"Q. When you were driving to Jackson Prison with Mr. Albert, were you alone?

A. No I was not.

[Again, after a full page of testimony.]

Q. Were there occasions when you went to Jackson Prison with *Mr. Albert* when the two of you were alone?

A. I have never gone alone riding down to Jackson Prison with *Mr. Albert.*" (Emphasis added)

Page 84C:

"MR BAIN: I'd like to request Mr. Louisell *ask a question and then give the witness a chance to answer and not start an argument.*" (Emphasis added)

[No comment by the court or exception by Mr. Louisell]

As always, perhaps unfortunately, it will take a deliberate and comprehensive reading of the entire transcript of the Preliminary Examination in order to reach some realization of the inevitable erosive effect of her cross-examination upon Mrs. Lazaros (and, through her, Mr. Lazaros), and upon her reservoir of forbearance which was scarcely limitless under the circumstances. For example, over the space of less than a page of the transcript (74, 75; first morning session), defense counsel *seven times* uses, as a key phrase in questions, the words, "telling your story" or "told your story." On top of this, the cold record is powerless to communicate the facial expression, the manner, the gesture, the tone and other

possibly critical factors which served to heighten the provocative thrust of what we have here quoted. All things considered, Mrs. Lazaros' patience brought her through the Preliminary Examination reasonably well, with only occasional and minor lapses from restraint. We respectfully urge, however, that just as her mind and body were then entirely "exhausted," her self-control in the total case situation was nearly so. The defense plan of cross-examination had already been successful. Mrs. Lazaros and, through her, the volatile Mr. Lazaros, were "ready for trial." Once the trial started, their festering indignation against the defense technique of ridicule, made them quick and easy prey.

* * * *

Our quotations from the trial record are extensive. Except for occasional comment in brackets, we shall simply offer them seriatim. We will not, however, necessarily proceed chronologically in order of the pages of the transcript.

* * * *

Mr. Lazaros

To some extent we have already presented certain demeaning questions and comments directed by defense counsel to this witness. We have also, we believe, demonstrated that the question which elicited the "Mafia" reference was, whether or not deliberately designed to do so, *so composed* [i.e., in the context of Mr. Lazaros' publicized claims, *and* counsel's knowledge of those claims in general and of The Kingsley (December, 1967) incident in particular] as inevitably to produce the answer given. The

witness' only other alternatives were either to deny under oath what he had theretofore consistently sworn to before other public agencies, *or,* while admitting the bribe payments, to withhold the name of the alleged *source* of the bribes, thus leaving a substantial inference (even if he said, "on behalf of other parties") that the monies were paid on behalf of Barbara (his admitted associate at the time) and/or himself. Such self-immolation, adding injury to the insult of the ridicule-intended question, cannot fairly be exacted of a witness, even under the "constitutional" cloak of according defendant his fair ("but not perfect") trial. It is plain, as we suggested earlier, that Lazaros first inquired to be sure of the incident intended by the cross-examiner's question, then (T. 172): "You asked me."] determined (apparently erroneously in the view of the trial judge) that the mention of "Mafia" was necessarily involved in the question asked," and thereafter sought to answer the question accordingly. Let us look at the situation conversely. Was it fair for defense counsel, after having the Court ban mention of "Mafia" (in the form of the instruction given), then to exploit the ban to the disadvantage and embarrassment of the witness, by *deliberately inquiring* as to a bribe incident of which counsel *knew* the "Mafia" was (in the mind of the witness) the most important (and "necessarily involved") part? More to our point here, in all the circumstances, could counsel *reasonably* have expected any other kind of answer from this witness? We urge again that, intentionally or otherwise, counsel's question *invited* the answer it received.

Before proceeding to further significant quotations from the trial transcript, we respectfully ask the Court to note, on the *entire* record of Lazaros' testimony, how repeatedly the witness was encouraged to rambling and/or unresponsive answers by counsel's comments (instead of substantive

questions) such as, "Are you through?"; "All right"; "All right, go ahead"; "Is that right?"; etc. At one point (later quoted herein) *shortly after* the early (and single) "Mafia" reference, counsel allowed the witness to ramble for almost four pages of the transcript, in answer to various questions, and then objected to the Court that whereas all he was seeking was a simple answer to his very *first* question, what he was getting was a *lot of hearsay*. We urge that the effect of such "questions" and incidents, was to create an accepted pattern of looseness and unresponsiveness. This is very significant in our view, because it is after that point in the record, that virtually all of the allegedly unresponsive and prejudicial answers occur.

We now proceed to quote from the trial record [in addition to the episode of the four-plus pages of irrelevant answers which counsel permitted and pursued at length, then characterized as "hearsay"] insulted the witness for no other reason than apparently to provoke him; (admittedly) elicited responsive answers, only to assail the witness for giving them; again and again, either recklessly or deliberately, invaded the danger-fraught "bribe" area; invited the witness to say more, after the witness had already said that his (Lazaros') credibility was better than that of counsel or the defendant; and ordered the witness to re-examine an exhibit which he had already examined. Suggesting, accordingly, that the (sometimes) shambles of the Peter Lazaros cross-examination were in large measure contributed to, if not induced by, defense counsel, we quote the incidents (not necessarily in chronological order) as follows:

T. 185:

"Q. *You'd do anything* that would serve your purpose *at any time*, wouldn't you, Mr. Lazaros, if you thought it would further your ends, isn't that true?

A. Well, let me tell you something, Mr. Barris, I'm trying to answer your questions the best way I know how. *If you're going to start insulting me* — I just said to you that if I had to bribe somebody to do Barbara a favor, I would do it." (Emphasis added)

T. 187:

"A. No, they told me it could be a heart problem, but then they found out that I had a sugar diabetes attack.

Q. You mean you were *suffering from prisonitis*, was it not?

A. Now you are argumentative with me.

MR. BAIN: Objection.

THE COURT: Objection sustained." (Emphasis added)

T. 176:

"Q. In other words, *you, at your stage in life, now decided to be a pillar of the community*, is that correct?" (Emphasis added)

T. 170, 171:

"Q. You do keep in touch with your attorney, do you not, *the latest of a whole list of them?*

A. I don't like your insinuation, Mr. Barris.

MR. BAIN: Objection, your Honor—

THE COURT: Objection sustained." (Emphasis added)

T. 169:

"Q. Now, you weren't exonerated by that Order, were you?

A. I don't know what the word exonerated means.

Q. *I should think you don't.* But in any event, Mr. Lazaros, you know that the matter was remanded back for a new trial?" (Emphasis added)

T. 204:

"Q. Now, you had a *whole succession of lawyers* from time to time, did you not?

A. *Just a minute, just a minute, Mr. Barris, you're using the word succession, I had lawyers.*" (Emphasis added)

T. 233, 234:

"Q. You even remember what your answer was, without even looking at this?

A. That's right, because I got a good memory, Mr. Barris.

Q. *You didn't have one about two minutes ago.*

THE COURT: *Proceed without drguing with the witness.*" (Emphasis added)

T. 198:

"A. I haven't filed because your client stole lots of those records out of my house, plus —

Q. You were there when my client stole the records?

A. That's only my information, sir. I was in prison, you know that.

Q. In other words, it was hearsay; is that right?

A. *Somebody told me. Look, Mr. Barris,* I'd like to say this to you, like to say this to the Court and to the jury, *I don't want to be argumentgl with you, I'm here to tell the truth, not to argue with you.*" (Emphasis added)

T. 234:

"Q. Let me finish the question, 'Do you recall that?' 'A. Yes, I seen it in the paper. I wasn't in the courtroom. Q. I see, do you have any knowledge of this $15,000 in cash and/or securities? A. Wasn't no cash or securities, I don't know.' Now, were you telling the truth?

A. I'm just telling you what I said yesterday and I'm saying that today, we never established what it was.

Q. Did you make this answer under oath?

A. Look we're here on extortion, we're not here on a bill that's already been paid, Mr. Barris. Let's get to the facts of this case.

Q. *We're here to test your credibility.*

A. My credibility is better than yours, and better than that thing there.

Q. *Go ahead, do you have anything more to shoot your mouth off about?*" (Emphasis added)

T. 201, 202:

"Q. All right, but you were sued before you paid it, isn't that right? You were sued in the Circuit Court for the County of Oakland, in a case assigned to Honorable Judge Templin? You were sued?

A. I'm not denying that. As I said to you before, being in business, you can be sued at any time. I've sued lots of people, too.

Q. *Uh-huh.* Now, all this time you had, as I understand, when you went to Jackson, as much as $15,000 in cash, maybe more, plus a lot of securities, is that correct?" (Emphasis added)

T. 202:

"A. I never had depositions with Mr. Finn representing me at my house.

Q. *Is that right?*

A. I don't remember anyway.

Q. *Uh-huh.* All right, now I want to ask you if you remember these questions being put to you by Mr. Warren, and Mr. Finn being right there—" (Emphasis added)

T. 168:

"Q. Who were your body guards, *at tax payers' expense,* last week?

A. I wouldn't call them body guards, sir.

Q. What would you call them?

A. I would call them law enforcement officers that are out to protect me from these people.

Q. *All right, now, we'll use your language, Mr. Lazaros, we'll play the game according to your rules* —

A. You know my rules, you've been living with my kind of people all your life, so you should know.

Q. *Are you through?*

A. Yes, I am." (Emphasis added)

T. 188:

"Q. Now, *Mr. Barbara* — excuse me, I'm sorry, Mr. Lazaros, how long were you at the Deaconess Hospital?" (Emphasis added)

T. 205:

"Q. Ok, now, were you ever present when your wife indicated, in your presence, to Mr. Phillos, that if Mr. Adell made any effort to go to the Prosecutor or take certain checks to the public officials, she was going to claim that Mr. Adell had raped her?

A. Let me tell you something, Mr. Barris, *I'm trying to answer you calmly and nice,* even though after nine months what I've gone through; you know that is a lie and you're talking about Phillos, if you're talking about Phillos that he had nine wives in a period

of a year and-a-half, I want you to clarify that, is that the Phillos you're talking about?

Q. *Did he have them consecutively or concurrently?*

A. I don't know. He had nine wives in a period of a year and-a-half.

Q. *The punishment for nine wives — go ahead.*" (Emphasis added)

T. 241, 242:

"Q. Mr. Lazaros, you and your wife were separated on occasion during your marriage, weren't you?

A. That's a lie.

Q. Absolute lie?

A. She filed for divorce, but we were never separated.

Q. She's *petrified of you*, isn't she? She's afraid of you?

A. Let me tell you something, Mr. Barris, *you're going to ask me these questions like a gentleman.* Look, I'm fighting for my life, and I don't care what you say to me, but I love my wife and I love my kid.

Q. You've beat her up on occasion?

A. You're a liar. Whoever tells you that — my life is in danger today. And I love my wife.

THE COURT: Proceed by question and answer.

MR. BARRIS: I do, your Honor. I can't stop this man, nobody has been able to.

A. *You're insulting me.* I love my wife and I love my retarded kid, that he put back three years.

THE COURT: Listen to the questions, answer the questions and proceed from there." (Emphasis added)

T. 189:

"Q. Did you speak to him [Barbara] at that time?

A. Yes. He walked up to me, they had me in the hallway there because they couldn't get no room, and he says to me, 'Don't worry about it, Pete, Mr. Rogers in New York already got the Supreme Court Justice Abe Fortas taking care of it.'

Q. *All right, so you're suggesting now that Mr. Rogers had some sort of in with Justice Fortas, is that right?*

MR. BAIN: *Objection, he's not suggesting anything, he's responded to the question, he's responded with what Mr. Barbara allegedly told him.*

MR. BARRIS: *I think that's right*, your Honor, I'll withdraw the question." (Emphasis added)

T. 191, 192:

"A. I wouldn't say from time to time. At one time, the last time that I ever heard of Mr. Barbara, was when my wife said that Mr. Rogers was in Detroit, and that Mr. Barbara, with Mr. Rogers and a Mr. Scott, John Scott, that they were going to — they had it all set up again with T. John Lesinski.

Q. *Now, you're suggesting that Judge Lesinski—*

A. *I do not suggest.*

MR. BAIN: *Objection.*

THE COURT: *Objection sustained, rephrase your question.*

MR. BARRIS: Fine, your Honor.

Q. *Now, all right, I'll ask you pointblank, do you have any knowledge that anybody was making a pay-off to Judge John Lesinski?*

MR. BAIN: *Objection, no* proper foundation.

THE COURT: *Objection sustained.*" (Emphasis added)

T. 192, 193:

"Q. So by your calculation, the last you heard of any efforts on your behalf by Mr. Barbara was this conversation involving Mr. Scott, which occurred one to two months after you went to jail?

A. I didn't say that. What I said to you, in that period.

Q. Well, what I'm trying to find out is when the last time — well, strike that — *when was the conversation involving Mr. John Scott and his Honor, Judge Lesinski?*" (Emphasis added)

T. 239, 240:

"Q. Now, sir, do you remember a time when Mr. Phillos went over to the State Police and made a written statement concerning what he knew about a supposed attempted to bribe then Prosecutor Bronson?

A. Just a minute, Mr. Barris, if you're going to tell the facts to this Court, to the jury, you might say it to the jury right.

Q. Do you remember that?

A. If they're lying to you outside, I might as well tell you the facts. I remember that Mr. Phillos came to my house, and he requested that we call the State Police. And the State Police was present, Mr. Jack Bain was present, and a court reporter was present, and he give a statement.

Q. Do you remember that one statement was given by him, and that he then recanted it, and that you spoke to him in Greek, right in the presence of Mr. Aird?

A. No, you want to know—I only talked to him in Greek two words, he asked me, if you want to know, Mr. Barris, 'Should I tell them about the $22,000 you give Mr. Bronson?' And I says, 'You go ahead and tell him the truth.' And another thing, Mr. Barris, Mr. Phillos had come up to me in the presence of other people, that we have tape recordings of it, that Mr. Phillos said that he's been threatened by these people. He's been threatened by the Prosecutor's Office in Detroit, unless he comes down and signs a warrant against me, that they would do something to him. And we have tape recordings to that, not only statements; and not only that, we have witnesses, honorable witnesses.

Q. Who are these honorable witnesses?

A. They will be called in.

Q. Well, name them.

A. I don't have to name them to you at this time.

MR. BARRIS: Well, your Honor, I ask, since he brought this up, that he—

THE COURT: *What does that have to do with the trial of this cause?*" (Emphasis added)

T. 184, 185:

"Q. Did you get any money from anybody to arrange for that extension of time?

A. I was getting to that, Mr. Barris. It cost me a thousand dollars out of my own pocket.

Q. Who did you pay?

A. I paid John Klaus.

Q. *You mean you paid it under the table.*

A. I give him a thousand dollars.

Q. Why?

A. For the favor.

Q. *To bribe, an agent of another?*" (Emphasis added)

T. 243:

"Q. I'm sure you recognize her handwriting then, do you not?

A. Yes, but I know you kind of people, you're very good experts on that.

Q. *All right.*

A. I live with you people.

Q. *You don't live with me.*

A. You represented me, I know your kind.

MR. BARRIS: Well, your Honor, I don't think I have to take this kind of abuse.

A. That's not my wife's signature.

Q. You deny that's your wife's signature?

A. It doesn't look like my wife's signature.

Q. *You look at it again, you're under oath.*

A. I looked at it once, I know I'm under oath. *I don't have to take your orders.* I'm not in Greek-town here." (Emphasis added)

T. 180-184:

"Q. All right, go ahead. *Tell us then, did you intervene on behalf of Mr. Barbara, to secure an extension of that loan?*

A. At the time, that loan was the kind of loan that he had — if the loan was to be called in, Mr. Barbara had 60 days to make the loan good.

Q. *All right:*

A. But, Mr. Barbara and his uncle, Mr. Vitale, Paul Vitale, had come up to me and they had begged me, if I could — because they knew that I knew the people that they work for John Kales — if they could get an extension to make payments on the $88,000 loan, due to the fact that they were about ready to go out of business. And if Mr. Kales would call that $88,000 loan back, it would necessarily put them out of business. Then, I contacted a Mr. John Klaus.

Q. Who is Mr. John Klaus?

A. Mr. John Klaus, at the time, I don't know if he is yet or any more, was a Vice President for a bank out of Indianapolis, Indiana, the Morris Plant Bank, and they had a branch here of a loan company, or finance company, I'll tell you the name in a minute. And I asked him, I says, 'Could you do me a favor?' I says, 'Joe Barbara is a friend of mine, Mr. Vitale is a friend of mine, would you try and give these people a little time to pay it, because if John Kales calls in the loan for the $88,000 or thereabouts, that would put them in a bad position.' He says to me, 'Pete, for you, I will do it.'

Q. Who is this, John Klaus?

A. That is right, 'I will try.'

Q. What was Mr. Klaus' relationship with Industrial Finance?

A. He used to work there, but the same time, as I explained to you before, Mr. Barris, he had quit from there and he had his own company, he was Vice President for another company. And he explained to me that if Mr. Kales don't want to give Mr. Barbara

an extension for the $88,000, that he would buy the contract and hold it himself, through his company. Then Mr. Klaus come back to me and says, "I don't think that Industrial Finance, they want to keep on going, because," he says, 'one of Mr. Barbara's close friends from a company owned and operated by the same people,' he says, 'they have better experience, because they just beat that company for a million and-a-half dollars. And,' he says, 'Mr. Kales, he's about to go out of business, because he dealt with these people. And he don't want no more to do with Tri-County.'

Q. Now, is this Mr. Kales, John Kales or Bob Kales, that you're speaking of?

A. I believe it's John Kales.

Q. Are you sure of that?

A. I'm not positive of the first name.

Q. Let me ask you this, what was the title of Mr. Kales, the gentleman, whom you're referring to?

A. My information was, and is, Mr. Barris, that Mr. Kales is from the Kales family, from Whitehead and Kales, in the industrial business, and they own the Kales Building in Detroit. And that's all I can tell you, as far as Mr. Kales in concerned.

Q. Did you ever speak personally with Mr. Kales about this loan?

A. No, sir.

Q. You spoke only to Mr. Klaus?

A. That's right, sir.

Q. Mr. Klaus, as I understand, was not any longer with Industrial Finance Company when you spoke to him?

A. But he had influence with Mr. Kales, because they work close together. One would buy the other's contracts and things like that.

Q. Did you ever tell Mr. Barbara, at any time, that you personally called Mr. Kales and it was through your influence that an extension of this loan was obtained?

A. No, sir.

Q. You deny making that statement to Mr. Barbara?

A. That's right.

Q. You deny having spoken to Mr. Robert Kales or John Kales concerning the extension of this loan?

A. That's right.

Q. And your only contact, in an effort to get this loan extended, was with Mr. John Klaus, is that right?

A. Plus—I was getting to that, Mr. Barris, if you let me, I will explain to you. Plus, I've talked to Mr. Hudnut, which he was my attorney at that time. And I pleaded with him if he could get Mr. Barbara another source to take over the $88,000 so he don't have to go out of business. I got an eight months extension at the time. Now, the same time, Mr. Klaus says to me, 'I have a company,' that their offices, if my recollection is right, they are somewhere on Livernois, Building Trades, or something like that, it's a loan company, anyway, and Mr. Klaus has introduced Mr. Barbara to the president or one of the people involved

with that company. And then Mr. Klaus came back one day and he says to me, 'I took Mr. Barbara over there to try and get $88,000, but instead of that, he says, 'what he's doing, he put in an application for $250,000. So,' he says, 'Pete,' he says, 'I don't think this man is trying just to get out of problems, he's trying to borrow enough money because he knows he's going to go out of business.' I said to him, 'Don't prejudge him, maybe he needs some operating capital in order to survive.' Well, anyway, that loan was turned down because the people—this is only my information, nothing of my personal knowledge—

MR. BARRIS: *Your Honor, this is obviously hearsay, and my question is, Mr. Lazaros, what, if any, steps you took to get an extension of this $88,000 loan. That's all I'm interested in.''* (Emphasis added)

We add one final transcript quotation for another but relevant purpose. The Oakland County Assistant Prosecutor argued (on appeal in Michigan) that the trial record demonstrated that the witnesses Lazaros could have been controlled by defense counsel if he had so desired. In this connection, we have in mind [in addition to our previously mentioned point that even after a certain rambling and unresponsive answer-pattern emerged, defense counsel never sought the aid of the trial court in directing yes-no answers to questions properly put for that purpose; instead, after eliciting (if not inviting) answers that were at least partially unresponsive, counsel either passed (most of the time) the incident entirely, or objected (just a few times; *only* when the unresponsive material did not suit him) *belatedly* that the question could have been answered yes or no; moreover counsel made virtually no use of control-setting motions to strike], the further argument that the (trial) Assistant Prosecutor established that Lazaros *could*

not only be controlled, but very readily controlled. Conceding that, in the circumstances of the case, Lazaros was strongly prosecution-disposed, and therefore more receptive to prosecution control, we are nevertheless impressed by the quickness, curtness and effectiveness, which appear from the following (T. 210):

> "Q. Mr. Barris suggested that you might be testifying here as a result of your case which is pending. You've testified in a number of other matters, other than this one, is that correct?
>
> A. Yes.
>
> Q. Or at least talked to various police agencies about them?
>
> A. As I said, Mr. Bain, after what happened to my wife—
>
> Q. *Just answer my questions.*
>
> A. *Yes.*" (Emphasis added)

Thus, we respectfully urge that counsel's calculatedly insulting (hence, unfairly provocative) questioning of Mr. Lazaros, plus his seine-fishing tactic (or, at least, effect) in repeatedly allowing (indeed, sometimes encouraging, the witness to answer (and even argue) errantly and unresponsively (objecting only rarely, when the answer disserved the Petitioner); plus also his reckless and repeated invasion of the "Mafia"-oriented bribe area [it is remarkable that Lazaros did not mention the word many more times than once], makes him largely responsible for any alleged prejudice that might have *survived* the prompt and firm instructions of the trial court. Counsel, if he did not invite such answers, clearly chose to risk them.

In order, however, for the Court to reverse the District Court, it is of course not necessary to find the defense itself *largely* responsible as the State suggests. Rather, if *upon the entire record,* there is presented here a situation of doubt or question as to *who* was responsible, then Petitioner, with his burden of proof ("clear and convincing") in habeas corpus, has quite as conclusively (i.e., under the law) failed to offer here the requisite "clear" case wherein the Court is constitutionally constrained to exercise its extraordinary power of overturning a presumptively valid state court conviction. However often and emphatically reiterated by Petitioner [i.e., by citing cases (and even those inapposite upon their facts) of *direct appeals* of state and federal criminal convictions], the posture of Petitioner before *this* Court is *not* that of a *defendant* presumed to be innocent.

The supposed legal precedents relied upon below by the Petitioner, with the exception of their ringing asseveration of the constitutional right to fair trial, are quite inapplicable here. Just how has Petitioner shown irreparable prejudice to him through the "Mafia" allusion? *Where* did the *counsel-sought* "bribery" prejudice to Petitioner leave off, and "Mafia" prejudice begin; and *what* has Petitioner offered the Court to assist it in the impossible determination of such a refinement? Surely, "Mafia" imports (arguendo) no more than criminality. Does it *add* anything to the deeply offensive *crime* of bribe-induced seduction of high officials from their oath and duties in the public trust? If so, *what,* and *how much,* and *where or when* does that addendum enter the prejudice-composite?

And, as the Court will note from Petitioner's case authorities cited below, all appear to concern instances of prejudicial answers of persons *directly* identified with

law-enforcement and/or prosecution (e.g., police officer witnesses).

That the latter circumstance is a material, if not necessary, factor in the course of decision of these (still direct appeal) cases, was plainly indicated by the Court in *United States v. Matthew Rubino* 431 F.2d 284 at 288-289 (6 Cir. 1970):

> "*In the present case, where it is not shown that the newspaper stories came through or from the prosecution,* it is our opinion that the burden of establishing that he has been treated unfairly rests upon Rubino. Marshall v. U.S., 355 F.2d. 999, 1007 (9th Cir.), cert. denied, 385 U.S. 815, rehearing denied, 385 U.S. 964. *Rubino, in our opinion, has made no such showing in the record in the present case.*" (Emphasis added)
>
> " • • •
>
> "*There is no contention that any of this publicity was generated by a representative of the United States.* To the contrary the release of this publicity was beyond the control of the United States Attorney and United States District Judge who presided over the trial in the present case." (Emphasis added)

Another ruling of the Court in *Rubino* would appear to have particular pertinency in the circumstances of the case at bar (at 289):

> "*In the absence of affirmative evidence* of deprivation of a fair trial, *we decline to establish a precedent which conceivably could permit counsel, purposely or otherwise, to obtain* unfavorable publicity concerning himself in a local newspaper," [Here, the

obtaining of a prejudicial answer by a calculatedly provocative and "loaded" question, directed to an already antagonized witness in a *known* precarious area] "and *thereby make it virtually impossible for a valid conviction to be effected* against one of his clients in an unrelated case." (Emphasis added)

It is, however, the reasoning of the Ninth Circuit in (another direct appeal) *United States v. Ruby Lazarus* (April, 1970), 425 F.2d 638, which strikes closest analogy to our above argument that, since defense counsel's very question here imputed the twice-committed *crime* of *bribing* public officials, to his client Barbara (and counsel *knew* the witness would affirm his earlier accusations), the omission of "Mafia" from the witness' answer would scarcely have served to lift the heavy incubus of *criminality* from the defendant. For, the jury either accepted this witness or rejected him. Merely *because* defense counsel was hopefully proceeding on the ridicule-implied basis of reductio ad absurdum, it is simply fatuous to suggest that the jury *would not* believe the detestable briberies, but *would* believe the "Mafia" allusion, particularly when the two were inextricably linked in the witness' answer that the bribes were "representing the Mafia."

In the Ninth Circuit's *Lazarus,* supra, the latter had been convicted of perjury before a Federal grand jury investigating "syndicated gambling activities." At trial, the Government called a former United States Attorney as its witness to establish the materiality of Lazaros' testimony to the grand jury investigation. That investigation principally concerned a 1965 Palm Springs, California, meeting of "members of an alleged gambling syndicate." The Government's aforesaid trial witness stated that the meeting "*involved* people who were reputedly very high up in the Mafia organized crime syndicate in this country."

We grant, indeed expressly note, that the Ninth Circuit, inter alia, spoke as follows:

> "Although reference to the Mafia was by no means necessary to the proof of the materiality issue, it was not wholly irrelevant to the inquiry. *Part* of the information spread before the grand jury was a claimed link between the members of the Palm Springs meeting and the Mafia."

It is the other "part" of the information before the grand jury, however, which interests this Respondent, because it was critical to the Ninth Circuit's final disposition of the "Mafia" issue. That other "part" included information (some of it set forth in a half-page of the opinion) tending to connect the members of the meeting, including Lazaros, with a highly organized and syndicated gambling operation that was not only interstate but international. In addition, as the opinion states, "the activities of those who attended the meeting may have violated several federal statutes." In other words, quite apart from the "unnecessary" reference to the Mafia, the grand jury "information" *properly* summarized by the witness to the jury at trial, legitimately tended to identify the defendant and others with the commission of state and federal crimes.

It is in such a setting that the following language of the Ninth Circuit's opinion comes to us here, we submit, with a special significance. We quote (p. 641):

> "There well may be cases where reference in testimony linking the defendant to the Mafia, may require the granting of the defendant's motion for a mistrial. But this case is not such a case. The context of

Lazarus' testimony was an investigation of organized crime and racketeering. The reference to the Mafia was made in that context. The public has long been exposed to extensive publicity about the evils of organized crime. We have no reason to suppose that publicity about the evils of the Mafia has been more extensive or more virulent than that devoted to members of organized crime who are not Mafia associates. We likewise have no reason to suppose that the public has less hatred toward big-time racketeers who are not members of the Mafia than it has toward those who are. *We cannot say that the omission of any reference to the Mafia would have perceptibly brightened the jury's image of Lazarus or his associates. Moreover, nothing in the later developments at the trial points unerringly to undue prejudice to Lazarus that could be attributed to the unfortunate mention of the Mafia. We hold that the mention of the Mafia did not deprive Lazarus of a fair trial and that the district court did not abuse its discretion in denying his motion for a mistrial.* (Cf. People v. Curtis, (1965) 232 Cal. App. 2d 859, 43 Cal. Rptr. 286)." (Emphasis added)

CONCLUSION AND PRAYER

For the aforegoing reasons, the State contends that the interjection by witnesses Peter and Delores Lazaros of extraneous matters in the presence of the jury, in response to questions asked by defense counsel upon cross-examination did not deprive the petitioner of a fair trial.

Wherefore, for the aforegoing reasons, as well as the reasons so well-stated by Judge Fitzgerald in *People v. Joseph Barbara, Jr.* (1970), 23 Mich App 540, and in the

opinion of the United States Court of Appeals, the State most respectfully prays that Certiorari be denied.

Respectfully submitted

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